CLERK'S COPY. 7029

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. ~~265~~ 53.

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LULA T. LEWIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED MARCH 6, 1901.

(18,072.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1901.

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1 Caption.

Be it remembered, that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, at Fort Worth, begun and holden on the 26th day of November A. D. 1900, and which term adjourned on the 19th day of January A. D. 1901, the Honorable Edward R. Meek, United States district judge for the northern district of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to wit:

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163.

2 *Transcript from District Court of Tarrant County.*

Filed March 2nd, 1900.

Caption.

THE STATE OF TEXAS, }
County of Tarrant. }

Transcript of the record from the district court (48th district of Tarrant county, Texas,) to the circuit court of the United States in and for the northern district of Texas.

LULA L. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY.

Plaintiff's Original Petition.

STATE OF TEXAS, }
and County of Tarrant. }

In the District Court of said County.

To said honorable court:

Your petitioner, Lula T. Lewis, a resident of Fort Worth, Texas, complains of the Iowa Life Insurance Company and with respect shows that the defendant is a corporation organized and existing under the laws of the State of Iowa, having an agent in Tarrant county, Texas, the name of said agent being S. E. Starns. Defendant in the matters and things hereinafter set forth was engaged in business as a life insurance company and on the 13th day of March 1899, did issue its policy No. 30140, whereby it did, in consideration of certain agreements in the application therefor, copy of which application was to said policy attached, and of certain provisions and requirements set forth in said policy, and in consideration also of the payment of $74.61, being the premium on said policy for the first year, promise to pay the sum of three thousand dollars

to plaintiff, she being then the wife of the insured Thos. M. Lewis, less any indebtedness of the insured or the beneficiary to the defendant company, with the balance of any year's premium remaining unpaid within 60 days after the receipt and acceptance at the company's office in Chicago, Illinois, of the satisfactory proofs of the fact and cause of death within the terms of this policy of the said Thos. M. Lewis of Fort Worth, Tarrant county, Texas, provided said death should occur on or before 12 o'clock noon of March 4th 1900, which said policy was duly executed in behalf of the defendant by its duly authorized agent.

3 Plaintiff would further show that the provisions and requirements referred to hereinabove as a part of the said policy were in words and figures as follows, viz:

"This policy is a contract made and to be performed in accordance with the laws of the State of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said State, and shall not go into effect until the premium hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon the payment of the premium there shall be delivered a receipt signed by the president or secretary and countersigned by an authorized agent.

All renewal premiums are due and payable at the office of the company, in Chicago, Illinois, unless otherwise agreed in writing, but may be paid to authorized agents in exchange for receipts signed by the president or secretary, and countersigned by such agents. Failure to pay the premium required to renew this policy, or any part thereof, or any note given on account of the renewal premium or any part thereof, when due, shall cancel the insurance and terminate this policy and all payments previously made hereon shall belong to and be retained by said company.

Should this policy, or others of like form which may be issued to succeed it, be continued in force for the term of ten years, the said company will issue a new policy for an equal amount and equal term without medical re-examination, subject to the premium for the age then attained by the insured, provided the request for such new policy be made to said company in writing by the insured at least six months previous to the last day of the term for which the expiring policy can be renewed and provided this policy or others succeeding it, be returned to the office of the company, while in force, for this purpose.

This policy may at any anniversary of the date of its issuance be exchanged for any other form of policy issued by the company for an amount not to exceed the amount of this policy (whereby the insurance liability of the company shall not be increased, nor the premium rate lowered) and at the rate then charged by the company for the form of policy applied for, at the then age of the insured, or the insured may, at such anniversary, change this policy for an endowment, or any other form of policy contract, whereby the insurance liability of the company shall not be increased nor the

premium rate lowered (such policy to bear the same date, age
4 and number as the original policy) upon paying the difference between the premiums paid under this policy and the premiums required under the form for which this policy is to be exchanged, with interest. At the time of making such exchange the company will, upon request, make a loan under the new policy, in accordance with its terms, for the amount stipulated in such new policy. Such loan may be used in the payment of the premium or premiums upon the new policy.

Should change of policy be made as above, no medical re-examination will be required, provided applications be made in writing to the company at least six months prior to such anniversary and provided the first premium upon the new policy be paid while this policy, or any policy issued to succeed it, be in full force. All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company. No suit or action shall be maintained hereon unless actually begun within one year from the date of the death of the insured without reference to the time of furnishing the proofs of death. If any suit in law or equity be commenced after such period of one year, the lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding. Any assignment of this policy must be made in duplicate, and both copies sent to the home office for acknowledgment, one of them to be retained by the company. The company will not assume responsibility for the validity of an assignment."

Plaintiff would further show that at the time of making application for such policy, and on to wit: March 4th 1899, the said Thos. M. Lewis did execute and deliver unto the said S. E. Starns, as agent for defendant, and did on that day pay $74.61 under the recitation in the application of said policy as follows: "A note for premium of $74.61 has been paid under this application to make the insurance binding from the date hereof, on condition that if the risk is not assumed by this company, this sum is to be returned, in accordance with the receipt given as voucher for said payment," and plaintiff would further show that said Starns for and in behalf of the defendant company did accept said note in payment of premiums on said policy for the year next succeeding March 4th 1899.

Plaintiff would further show that at the same time and on March 4th 1899, S. E. Starns for and on behalf of the defendant did exe-
cute and deliver unto the said Thos. M. Lewis certain instru-
5 ments styled "agent's receipt for advance premiums," reciting:

"Iowa Life Insurance Company. Received from Thomas M. Lewis thirty-seven and $\frac{3}{100}$ dollars being the annual premium on an insurance of $3,000 *dollars* on the life of said Thomas M. Lewis for which application is this day made by him to the Iowa Life Insurance Company."

"The said Thomas M. Lewis shall be insured from the date of this receipt, in accordance with the rate of premiums and provisions of

the policies of said company. Provided always, such application shall be approved and accepted by the company; but should the said application be declined by the company, then the amount the receipt whereof is herein acknowledged will be returned within thirty days.

Dated at Fort Worth, March 4th 1899.

S. E. STARNS, *Agent.*"

On March 18th 1899, S. E. Starns for and in behalf of the defendant did issue certain instruments of that day as follows:

"Iowa Life Insurance Company, Chicago office.

Received $74.61 being the first annual premium due March 4th 1899, under policy No. 30140, on the life of Thos. M. Lewis, subject to the terms of the contract and the conditions on the back hereof.

Read the notice to policy-holders on the back of this receipt.

This receipt is not binding unless it is countersigned by

(Countersigned) S. E. STARNS,

Agent, Fort Worth, Texas."

Executed by the president of the defendant.

On the back said instrument reads as follows:

"For terms of mutual agreement, see application and policy. Notice to policy-holders. This receipt to be valid must be signed by the president or secretary of the company and in exchange therefor, cash or its equivalent be given by the holder of this policy, on or before date payment is due, and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

Plaintiff would with respect further show unto your honor that by virtue of matters and things set forth herein the defendant did become liable and promise to pay the plaintiff the sum of three thousand dollars in case he, the said Thomas M. Lewis, did, between March 4th 1899 and March 4th 1900, depart this life.

Plaintiff would further show that Thos. M. Lewis did depart
6 this life on to wit: — day of —— 1899, whereupon this defendant did cause to be made unto S. E. Starns as agent of said defendant, an application for the furnishing of proofs of death in such form as might be required by defendant in order that she might cause same to be presented to the defendant at its home office in the city of Chicago, State of Illinois, as provided by the terms and conditions of said policy; whereupon said S. E. Starns, acting for and on behalf of the defendant, did refuse to furnish to the plaintiff proofs of death and stated that he on behalf of the defendant refused to recognize any liabilty on the part of the defendant, — the plaintiff by reason of the matters and things hereinabove set forth.

Plaintiff would further show that heretofore and on to wit: the

4th day of January 1900, she did cause to be written unto the defendant at Chicago, Illinois, a letter stating that Mr. Starns had refused in behalf of the company to recognize any liability under the policy herein sued on, and had refused to furnish proofs of death, and that the letter further requested that the defendant would, by return mail, advise plaintiff's attorneys, Messrs. Capps and Cantey, who wrote said letter, as to whether or not they recognized any liability under said policy or would furnish proofs of death.

Plaintiff would further show that notwithstanding said request for early answer defendant neglected to answer said communication, so that the reply was not mailed in Chicago until January 15th 1900.

Plaintiff would further show that said reply states that the matter in question should properly have the attention of the general counsel, who had been ill and was just then leaving the city for a trip of a week or ten days, and that reply to plaintiff's communication would have to wait until his return.

Plaintiff would further show that the Febr'y term of this honorable court is so near at hand that she cannot wait the time stated in said letter without the probability of considerable delay in service upon the defendant, for which reason she does now institute this suit upon the said policy relying upon the declination of the defendant's agent, S. E. Starns, to recognize any liability under said policy.

By virtue of the premises and of the laws of the State of Texas to such cases relative, plaintiff says that defendant became liable bound and promised to pay unto the plaintiff the sum of three thousand dollars, with interest thereon from the date of the death of the said Thomas M. Lewis, together with penalty of 12% on the amount due him, together with a reasonable attorneys' fees,
7 which the plaintiff here alleges to be ten per cent. upon the amount due under said policy as interest, principal and penalty;

Wherefore, premises considered, plaintiff prays that the defendant be cited to appear in answer herein and that upon hearing hereof she have judgment for her debt, damages, interest, attorneys' fee and costs of suit, together with all other and such further relief which she may be entitled to receive, either legal or equitable, both general and special.

CAPPS AND CANTEY,
Attorneys for Plaintiff.

Filed January 27th 1900.

W. D. McVEAN,
District Clerk.

Cost Bond.

In the District Court of Tarrant County, Texas.

LULA T. LEWIS
vs. } 17303.
IOWA LIFE INSURANCE COMPANY.

STATE OF TEXAS, }
Tarrant County. }

Know all men by these presents: That we, Lula T. Lewis, as principal, and —— —— and —— —— as sureties, do hereby acknowledge ourselves bound and firmly held to pay all costs which may accrue in the prosecution of the above styled and numbered cause in the district court of Tarrant county, Texas.

Witness, our hands this January 19, 1900.

Principal: LULA T. LEWIS.
Sureties: S. B. CANTY.
WM. CAPPS.
B. L. WAGGOMAN.
IRELAND HAMPTON.

Approved this January 27, 1900.

W. D. McVEAN,
District Clerk, Tarrant Co., Texas.

Filed January 27, 1900.

W. D. McVEAN,
District Clerk.

Citation.

The State of Texas to the sheriff or any constable of Tarrant county, Greeting:

You are hereby commanded to summon the Iowa Life Insurance Company, a corporation, by service hereof on S. E. Starns, its agent, to appear before the district court of Tarrant county, Texas, 18th judicial district, at the next regular term thereof, to be held at the court-house in the city of Fort Worth, on the second Monday in February A. D. 1900, the same being the 12th day of said month, then and there to answer the petition of Lula T. Lewis, plaintiff, filed in said court on the 27th day of January A. D. 1900, against The Iowa Life Insurance Company, defendant for suit, said suit being numbered 17303, the nature of which demand is as follows, to wit: That on March 13th 1899, defendant issued its policy of insurance No. 30140, insuring the life of Thos. M. Lewis, the husband of plaintiff in the sum of three thousand dollars, and by virtue thereof the defendant became liable to pay plaintiff said sum of three thousand dollars in case the said Thomas M. Lewis did between March 4th 1899 and March 4th 1900, depart this life and that the said Thomas M. Lewis did depart this life on the — day of —— 1899; whereupon plaintiff cause to be made

unto said Starns, as agent of defendant an application for the furnishing of proofs of death in such form as might be required by the defendant and that said S. E. Starns, acting on behalf of defendant refused to furnish to plaintiff proofs of death and stated on behalf of defendant *refused to furnish to plaintiff proofs of death and stated on behalf of defendant* that defendant refused to recognize any liability on the part of defendant to the plaintiff by reason of the matters set forth herein, by virtue of the premises, plaintiffs says, that defendant has become liable to pay her three thousand dollars, with interest from the date of the death of the said Thos. M. Lewis, together with the penalty of 12 % on the amount due together with 10 % attorneys' fees on the amount of said policy, principal, interest and penalty; wherefore plaintiff prays for her debt, damages, interest, attorneys' fees and costs of suit, and you will deliver to the said defendant in person a true copy of this citation.

Herein fail not, and have you then and there this writ, showing how you have executed the same.

Witness W. D. McVean, clerk of the district court of Tarrant county, Texas.

Given under mf hand and seal of office, at Fort Worth, this the 29th day of January A. D. 1900.

W. D. McVEAN,
[SEAL.] *Clerk of the District Court of Tarrant County, Texas.*
By J. C. BRANUM, *Deputy.*

Issued January 29th 1900.

W. D. McVEAN, *Clerk,*
By J. C. BRANUM, *Deputy.*

(*Sheriff's Return.*)

Came to hand this the 29th day of January 1900, and executed the 30th day of January 1900 by delivering to S. E. Starns,
9 local agent for the Iowa Life Insurance Company, a corporation.

STERLING P. CLARK,
Sheriff Tarrant County, Texas.
By C. E. PARSLEY, *Deputy.*

Fee—serving copy	1.50
Mileage	.10
Total	$1.60

Def'ts Petition for Removal of Cause.

In the District Court of Tarrant County for the 48th Judicial District of Texas.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } 17303.

To the honorable district court:

Iowa Life Insurance Company, the defendant in the above-styled cause prays that said cause be removed into the circuit court of the United States for the northern district of Texas, sitting at Fort Worth, and that this court proceed no further therein; and it shows grounds for its said petition as follows:

Said cause was begun by the plaintiff's filing her original petition in this court on January 27, 1900. Thereafter a citation was duly issued and served, by which your petitioner is required to answer said original petition before the call of the appearance docket on the second day of the term, beginning Monday, February 12, 1900. Your petitioner has not yet answered in said cause, but the same is now pending against it.

When said cause was begun the plaintiff was, and she now is, a citizen and resident of Tarrant county in the State of Texas, and the defendant then was, and it now is, a private corporation incorporated under the laws of the State of Iowa and a citizen and resident of said State of Iowa; and it was not then and is not now a resident of the State of Texas.

The matter in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Your petitioner files herewith its bond, whereon Fidelity and Deposit Company of Maryland is surety, for its entering in said circuit court of the United States, on the first day of the next session thereof, a copy of the record in said cause, and for paying all costs that may be awarded by the said circuit court of the United States if such court shall hold that said cause was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said cause if special bail was originally requisite therein.

MAURICE E. LOCKE,
Attorney for Petitioner.

THE STATE OF TEXAS, }
County of Dallas. }

Maurice E. Locke, being first duly sworn, upon his oath says: I am attorney for Iowa Life Insurance Company in the above styled cause. The allegations contained in its foregoing petition are true.

MAURICE E. LOCKE.

Sworn to and subscribed by Maurice E. Locke before me, this the 9th day of February A. D. 1900.

A. E. FIRMAN,
Notary Public, Dallas Co., Texas.

[SEAL.]

Filed Feb. 13, 1900.

W. D. McVEAN,
District Clerk.

Bond.

In the District Court of Tarrant County for the 48th Judicial District of Texas.

LULA T. LEWIS
vs. } 17303.
IOWA LIFE INSURANCE COMPANY.

Defendant's bond for removal of cause.

Iowa Life Insurance Company, a private corporation domiciled in Sioux City, Iowa, as principal, and Fidelity and Deposit Company of Maryland, a private corporation domiciled in Baltimore, Maryland, and duly authorized by its charter and by compliance with the laws of the State of Texas to do business as a surety company in the State of Texas, as surety, do hereby acknowledge themselves jointly and severally bound unto Lula T. Lewis, of Tarrant county, Texas, in the sum of one thousand dollars, well and truly to be paid unto her or her heirs, executors, administrators, or assigns.

The condition of this bond is such that if said Iowa Life Insurance Company, the defendant in the above-styled cause, now pending in the district court of Tarrant county for the forty-eighth judicial district of Texas, shall enter in the circuit court of the United States for the northern district of Texas, sitting at Fort Worth, on the first day of its next session, a copy of the record in said cause above named, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said cause was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit, if special bail was originally requisite therein, then this bond shall become null; otherwise it
11 shall remain in full force.

In testimony whereof, these presents have been signed at Dallas, Texas, by the obligors above named, both acting through their attorneys and agents thereunto duly authorized, this the 9th day of February, A. D. 1900.

IOWA LIFE INSURANCE COMPANY,
[SEAL.] By MAURICE E. LOCKE, *Its Attorney.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By A. T. WATTS, *Local Director.*

Attest: JNO. A. BAMARD, *Agent.*

Approved February 13th, 1900.
IRBY DUNKLIN,
Judge 48th Judicial District of Texas.

Filed February 13, 1900.

W. D. McVEAN,
District Clerk.

Order on Removal.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } 17303.

23RD FEBRUARY, 1900.

This day came on to be heard the petition of Iowa Life Insurance Company, *the petition of Iowa Life Insurance Company*, the defendant in the above-styled cause for the removal thereof to the circuit court of the United States for the northern district of Texas, sitting at Fort Worth, it is ordered by the court that the bond filed by the defendant with its said petition be approved, and that said cause be removed to the circuit court of the United States, and that this court proceed no further therein.

Bill of Costs.

LULA T. LEWIS, Plaintiff,
vs.
IOWA LIFE INS. CO., Defendant. } No. 17303.

Clerk's fees.	Plaintiff.	Defendant.
Filing and docketing	.30	
Issuing citations	1.00	
Recording return	.50	
Filing papers	.10	.40
Entering appearances	.05	.05
Entering orders	.....	.75
Transcript	.....	5.50
Total clerk's fees	1.95	6.70
Sheriff's fees.		
Executing citations	.85	
	2.80	6.70
Total		9.50

12 STATE OF TEXAS, }
County of Tarrant. }

I, W. D. McVean, clerk of the district court of Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of all the proceedings had in said court in cause No. 17303, Lula T. Lewis *vs.* Iowa Life Insurance Company, as the same appears on file and of record in my said office.

Given under my hand and seal of said court at office in the city of Forth Worth, Texas, this the 2nd day of March, A. D. 1900.

W. D. McVEAN,

[SEAL.] *Clerk District Court, Tarrant County, Texas.*

The foregoing has the following endorsement, to wit: No. 163. Lula T. Lewis *vs.* Iowa Life Insurance Co. From district court, Tarrant county, Texas. Filed 2 day of March, 1900. J. H. Finks, clerk, by J. B. Finks, deputy.

13 *Plaintiff's 1st Amended Original Petition.*

Filed January 10th, 1901.

In the United States Circuit Court for the Northern District of Texas, Sitting at Forth Worth.

LULA T. LEWIS *vs.* IOWA LIFE INSURANCE CO. } No. 163.

To the honorable judges of said circuit court:

Now comes Lula T. Lewis, plaintiff, and with leave of court first had and obtained files, this her first amended original petition, and complaining of the Iowa Life Insurance Company, with respect represents that plaintiff is a resident citizen of Tarrant county, Texas, and the defendant is a corporation organized under the laws of the State of Iowa, also maintaining an office in Chicago, Illinois, and at the times hereinafter mentioned had and maintained an office and agency in Tarrant county, Texas, and at the times hereinafter mentioned said defendant was engaged as a life insurance company doing business in the State of Texas and in the city of Fort Worth and elsewhere.

Plaintiff represents that heretofore, to wit: on the 13th day of March, 1899, the said defendant insurance company did execute, issue and deliver to one Thomas M. Lewis, the husband of the plaintiff, its certain policy of life insurance, the same being No. 30140, whereby the said defendant did according to the face and terms of said policy covenant, contract and bind itself that in consideration, among other things, of the payment of $74.61, the same being the premium on said policy for the first year, promise and agree to pay to the plaintiff, Lula T. Lewis, wife of Thomas M. Lewis (if living, if not living to the insured's executors or assigns, less any indebtedness of the insured or beneficiary to the defendant, together with the balance of any year's premium remaining unpaid) the sum of $3,000 within sixty days after receipt and acceptance at the defendant company's office of satisfactory proofs of the fact and cause of death of said Thomas M. Lewis of Fort Worth, Texas, provided the said Thomas M. Lewis should die on or before twelve o'clock noon of the 4th day of March A. D. 1900. That thereby and by reason thereof the said defendant insurance company became liable and

promised and agreed with the plaintiff by said contract or policy in writing as aftersaid to pay her the sum of $3,000 provided that the death of Thos. M. Lewis should occur on or before the 4th
14 day of March 1900, and to pay the same within sixty days after the receipt by it of satisfactory proofs of the fact and cause of death of him, the said Thomas M. Lewis.

And the plaintiff would further show that the said Thomas M. Lewis, the husband of plaintiff, had by the terms of said contract insured his life for the plaintiff upon his death provided he should die during the period of one year, beginning on the 4th day of March 1899 at noon, and ending on the 4th day of March 1900 at noon.

Plaintiff would further represent and show unto your honors that the said Thomas M. Lewis, the insured mentioned in said policy above set out, died in Fort Worth, Texas, on to wit: the 7 day of October 1899, and while said policy of insurance was in force and obligatory according to its terms above set out upon said defendant. That within a few days after the death of said Thomas M. Lewis, to wit: on the — day of October 1899, the said plaintiff through her authorized agents and representatives applied to the defendant insurance company through its duly authorized agents and representatives in Fort Worth, Texas, for blank proofs of death in such form as might be required by the defendant in order that she might cause the same to be made out and presented to the defendant, as provided by the terms and conditions of said policy, and at the same time notified the said agent and representative of defendant, to wit: one S. E. Starn, of the death of said Thomas M. Lewis.

Plaintiff represents that at that time and for a long time theretofore the said defendant company had and kept certain blank forms of proofs of death which it required to be used in furnishing proofs of death under its policies, and which it was defendant's usage to furnish and provide to beneficiaries under policies issued by it upon the maturity of same. That upon such application to said Starn as aforesaid for blank proofs of death, he, the said Starn, acting for and on behalf of defendant and being thereunto duly authorized, did peremptorily refuse to furnish to the plaintiff or to her agents and representatives for her benefit, any blank forms of proof of death whatsoever, and did then and there on behalf of said defendant company disclaim and refuse to recognize any liability whatsoever on the part of the defendant company on account of said policy herein sued upon and issued as aforesaid upon the life of said Thomas M. Lewis.

And plaintiff would further show that thereafter and on to wit: the 4th day of January 1900, she did cause through her agents and attorneys a certain letter to be written to said defendant in-
15 surance company to its home office, wherein and whereby she did advise the said company at its home office, that through said agent it refused to furnish said blank proofs of death to plaintiff, and had refused to recognize any liability upon the company on the said policy herein sued on, and disclaimed all liability on the part of the company, and the said letter so written on behalf of the plaintiff aforesaid requested the defendant company that it

would advise the plaintiff's attorneys, who wrote the said letter whether or not the company confirmed or ratified the acts of said Starn or recognized any liability under said policy, or would furnish any blank forms of proofs of death in order to enable plaintiff to comply with the terms of said policy.

Plaintiff would show that notwithstanding said communication in substance as hereinabove set out the defendant company did not reply until the 18th of January, and in and by said reply said defendant company stated that the matter inquired of should have the attention of their general attorney and refused (by their silence) to furnish the blank forms, or disclaimed or repudiated the acts of said Starn which had been fully communicated to it. That said defendant in all things last above set out, fully ratified the acts of said Starn, and said defendant did refuse to furnish any forms of proofs of death, and has at all times since the death of said Thomas M. Lewis refused to acknowledge any liability on account of said policy, and has claimed that said policy was not in force at the time of the death of said Lewis; that by reason of the foregoing facts the said defendant waived the requirements of said policy requiring the receipt by it of proofs of the fact and cause of death of the insured Thomas M. Lewis.

Plaintiff would further show that by virtue of the laws and statutes of the State of Texas in such cases relative the defendant has become liable and bound to plaintiff for interest on the amount of said policy from the date of the death of said Thomas M. Lewis, together with a statutory penalty on the whole amount due her of 12 per cent., and also a reasonable attorneys' fee in this behalf, which reasonable attorneys' fee, plaintiff alleges, is the sum of $750, and that the plaintiff in addition to the amount of the policy sues herein and in this behalf as well to recover the interest and 12 per cent. penalty and the attorneys' fees hereinabove set out. That by virtue of the premises and of the laws of the State of Texas the defendant insurance company has become liable and bound and promised to pay unto the plaintiff the said sum of $3,000 as stipulated in the face of said contract or policy of insurance as hereinabove set
16 out, together with the interest thereon from the date of the death of the said Thomas M. Lewis, to wit: October 7, 1899, and the penalty of 12 per cent. thereon and the sum of $750 as attorneys' fees, for which amount she prays the judgment of the court, and also for such other and further relief including costs of suit as she may be entitled —, legal or equitable, general and special.

CAPPS & CANTEY,
Att'ys for Pl'ff.

The foregoing has the following endorsement, to wit:—

No. 163. Lula T. Lewis *vs.* The Iowa Life Insurance Company. Plaintiff's first amended original petition. Filed 10 day of Jan'y 1901. J. H. Finks, clerk by J. B. Finks, deputy.

17 *Plaintiff's 1st Supplemental Petition.*

Filed January 10th, 1901.

In the United States Circuit Court for the Northern District of Texas, Sitting at Fort Worth.

LULA T. LEWIS
vs.
THE IOWA LIFE INSURANCE CO. } No. 163.

To the honorable circuit court:

Now comes the plaintiff, Lula T. Lewis, and with leave of the court first had and obtained files this her first supplemental petition, and by way of replication to the defendant's first amended answer, says:

1st. The plaintiff demurs to the pleas contained in defendant's amended original answer, saying that the same and each of the same are insufficient in law, wherefore she prays judgment of the sufficiency of the same.

1st *a*. And for further replication the pl'ff denies — and singular the allegations in def't's answer contained and of the same demand strict proof.

2nd. And for further answer and by way of replication to said defendant's answer, plaintiff represents and would show to the court with reference to so much of defendant's answer as pleads or alleges the conditions of the policy, namely: "that same should not go into effect until the premium should be actually paid," that this provision of the policy sued on was at the time of the issuance of same duly and legally waived in this, that the defendant's agent, one Starn, who solicited the insurance and had authority to collect the premium therefor, was entitled to receive of the first premium, or of the annual premium in consideration for which said policy was issued, as much as to wit: 75 per cent. of same. That at the time of issuing the policy sued upon the said Starn entered into an agreement with the insured, Thomas M. Lewis, by the terms of which said Lewis agreed to do and perform certain services for and for the benefit of said agent S. E. Starn between them agreed upon, to the extent of one-half of the said premium, and to wit: $37.30; and the said Starn further agreed to accept on behalf of the said defendant company the note of the said Thomas M. Lewis for the balance of said premium, to wit, $37.31. That in addition to the agreement and contract between the said Starn and the said insured with reference to the performance of the said services hereinabove mentioned, the said Thomas M. Lewis executed and delivered to the said Starn his certain promissory note payable to the order of himself, due six months after date, for the sum of $37.31, payable at

18 Fort Worth, Texas, which said note was a negotiable instrument of the highest order and a complete and bonding obligation upon the said Thomas M. Lewis for the payment of the same.

That said note was unconditional in all respects and unaffected by any contract of insurance between the defendant and the said Thomas M. Lewis. That the said defendant company after the execution of said note and the execution of the said agreement for the balance of said premium between said Starn and said Thomas M. Lewis, ratified the acts of the said Starn in accepting payment of the premium in the manner in which it was made, and duly issued the policy of insurance herein sued upon, and acknowledged receipt of said annual premium of $74.61; wherefore the plaintiff says that said clause as pleaded by the defendant, if existing in said policy, has been wholly waived and the said defendant is estopped now to claim any benefit under the same.

3rd. And further answering and by way of further replication to the defendant's amended answer plaintiff would show that the policy of insurance sued on herein contained no provision that the same should be void in the event of the non-payment of any note given for the premium or a part thereof. That the note which was executed by the insured was a binding obligation upon him, negotiable in character and obligatory under all circumstances. That the same was unconditional and contained no provision for the forfeiture of the policy of insurance, and in no manner referred to the insurance. That the same was a payment of the premium, given and accepted as such. That at the time the policy was issued the said Starn as agent of the company had a right to retain out of said premium as much as to wit: 75 per cent. of the same individually for his own benefit, and in his own behalf the right to contract for the payment of that much of the premium as he might see fit, and as well the right and authority from the defendant to contract in any manner for the payment of the entire premium stipulated for in the policy. That when the said policy of insurance was issued, the said Starn as agent of the defendant accepted in payment of said premium of $74.61 the note hereinabove set out for $37.31 and the balance in other valuable considerations agreed upon between him and the said Thomas M. Lewis.

That the said note so given by the said insured, Thomas M. Lewis, for a part of said premium, matured on to wit: the 7th day of September 1899. That the same at the time of its maturity was in the hands of said Starn and was not presented to the said Thomas M. Lewis until, to wit: the 28th day of September 1899. That when the same was presented the insured and plaintiff beneficiary in said policy, agreed to pay the same at once. The
19 said Starns agreeing to receive the money at any time before the 1st of October 1899. That on to wit: the 29th day of September 1899 the said plaintiff and the said insured tendered the amount of said note to the said defendant through its agent Starn, who thereupon declined to receive the same. That the said defendant did not claim any forfeiture of said policy upon the maturity of said note and did not tender the said note or offer to deliver the same to the insured, and never have done so, but on the contrary the said defendant waived all its rights, if any it ever had, to claim a forfeiture of said policy for the non-payment of said note at

its maturity, and did agree with the insured and this plaintiff to extend the time of payment of said note at least till the 1st day of October 1899, and did agree to accept payment of same at any time before that day, and did make demand for the payment of said note after the same had matured, and that after the maturity of said note the said defendant did not claim a forfeiture, but recognized that said policy was still in force. That plaintiff and insured offered and tendered said money to said defendant through its said agent Starn in payment of said note before the 1st day of October, and did thereafter offer and tender the money to pay said note, which the defendant declined to accept, notwithstanding the fact that it still held the said note and still holds the same. That all the said tenders and agreements and waivers were made before the death of the said Thomas M. Lewis. That the plaintiff is still ready to pay said note and offers and tenders so to do, and as well any amount of principal and interest on said premiu- which is claimed to be due by said defendant.

Wherefore plaintiff says that the said defendant by its own acts and those of its agent aforesaid duly authorized, has waived any right, if it ever had any, to claim a forfeiture of said policy on account of the non-payment of said note at its maturity, and by reason of the premises are estopped to claim any rights by reason of that fact, or to claim that said non-payment of said note in any manner affected the terms of the policy of insurance sued upon. That the facts alleged in said amended answer by def't constitute no defense.

Wherefore plaintiff prays judgment as in its original petition.

CAPPS & CANTEY,
Att'ys for Pl'ff.

The foregoing has the following endorsement, to wit:—

No. 163. Lula T. Lewis *vs.* Iowa Life Insurance Co. Plaintiff's first supplemental petition. Filed 10 day of Jan'y. J. H. Finks, clerk, by J. B. Finks, deputy.

20 *Defendant's 3rd Amended Original Answer.*

Filed January 11th, 1901.

In the Circuit Court of the United States, Northern District of Texas, at Fort Worth.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163.

To the honorable the judges of said court:

1.

Now by its attorney comes the defendant in the above-styled cause, and under leave of the court files this its third amended original answer, in lieu of its second amended original answer filed December 27, 1900. So amending, it makes answer as follows to the first amended original petition of the plaintiff.

2.

The defendant demurs to said petition and says that the same is not sufficient in law to require of it further answer thereto.

3.

The defendant specially excepts to all that portion of said petition whereby, in addition to the face of the policy and interest thereon, the plaintiff seeks to recover from the defendant a statutory penalty of twelve per cent. of the whole amount due her, and an attorney's fee of seven hundred fifty dollars. The grounds of this exception are:

(*a.*) There is no law which is valid and binding upon the defendant and which requires it to pay anything to the plaintiff upon account of damages, penalty or attorneys' fees. Article No. 3071 of the Revised Statutes of the State of Texas, which alone purports to make such a requirement, is void because it contravenes the provisions of the fourteenth amendment to the Constitution of the United States, in that it denies to the defendant the equal protection of the laws.

(*b.*) Said petition does not show that the plaintiff ever demanded from the defendant payment of the policy sued upon.

4.

The defendant specially excepts to so much of said petition as seeks to recover from the defendant the sum of seven hundred fifty dollars as a reasonable attorney's fee. The ground of this exception is that said petition does not show that the plaintiff has paid or promised to pay said sum, or any sum, as fees to attorneys for their services in prosecuting and collecting her claim against the defendant.

5.

The defendant denies all and singular the allegations in said petition contained.

21 6.

The defendant says that its only promise was that upon certain conditions it would pay the sum of three thousand dollars within sixty days after receipt and acceptance, at its office in Chicago, Illinois, of satisfactory proofs of the fact and cause of the death of Thomas M. Lewis. It never has received such proofs of death and never has waived the same. S. E. Starn, through whose acts the plaintiff alleges that the defendant waived such proofs of death, had no actual authority to waive the same in behalf of the defendant and was not held out by the defendant as having such authority; nor did the defendant ever ratify any waiver of said proofs of death by him made. One of the provisions and conditions of the policy contract sued upon is in words and legal effect as follows: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits

of any kind, or make an agreement binding upon said company." S. E. Starn never was the president or secretary of the defendant company.

7.

On to wit: March 4, 1899, Thomas M. Lewis applied to the defendant in writing for three thousand dollars of insurance upon his life in favor of the plaintiff, such insurance to be of the kind known as "ten-year convertible term stock" insurance. Said application was made through S. E. Starn, who was a soliciting agent for the defendant. In it the statement was made that a note had been given for the annual premium of seventy-four and $\frac{61}{100}$ dollars, to be returned in case the risk should not be assumed by the defendant. On to wit: March 13, 1899, the defendant decided to accept said application upon the terms and conditions therein stated and those usually embraced in its "ten-year convertible term stock" contracts of insurance. Thereupon it forwarded to its said soliciting agent for delivery to Thomas M. Lewis in exchange for his said note the policy sued upon and a receipt for the first annual premium. Said policy and receipt were of the form always used by the defendant in making its "ten-year convertible term stock" contracts of insurance. They were likewise of the form which Thomas M. Lewis understood would be employed. A policy and receipt of the same form were shown and fully explained to him by S. E. Starn at the time of making his application; and he then agreed that such a policy and receipt should be embraced in the contract of insurance for which he was applying, and that he would accept them as parts thereof.

In said policy it was stipulated that the same should not go
22 into effect until the premium of seventy-four and $\frac{61}{100}$ dollars for the first year should be actually paid; and that upon payment of the premium there should be delivered a receipt therefor, signed by the defendant's president or secretary and countersigned by an authorized agent. Said receipt was signed by C. S. Mabie, the defendant's president, and before delivery it was countersigned by S. E. Starn, the defendant's soliciting agent, thereunto authorized. It acknowledged receipt of seventy-four and $\frac{61}{100}$ dollars as the first premium on said policy, subject to the terms of the contract and the conditions on the back of the receipt. One of the conditions on the back of the receipt was that if a note should be given for said premium, or any part thereof, and should not be paid at its maturity, the said policy should cease and determine. The plaintiff is hereby requested to produce said receipt at the trial of this cause and notified that upon her failure to do so, its contents will be proved by secondary evidence.

In fact, no note for seventy-four and $\frac{61}{100}$ dollars ever was given for the premium on said policy. Instead thereof, Thomas M. Lewis executed, endorsed in blank, and delivered to S. E. Starn for the defendant, his promissory note, dated March 4, 1899, whereby he promised that six months after said date he would pay to his own order at Fort Worth, Texas, the sum of thirty-seven and $\frac{30}{100}$ dollars, to-

gether with interest thereon at the rate of six per cent. per annum; and he promised said S. E. Starn by word of mouth that within a reasonable time he would pay to him the sum of thirty-seven and $\frac{30}{100}$ dollars, being the remaining portion of the premium. S. E. Starn accepted said note and oral promise in settlement of the first premium, subject to the conditions of the policy and premium receipt; and the defendant ratified his action in so doing. In exchange for said note and promise, the policy sued upon and the premium receipt above described were delivered to Thomas M. Lewis on to wit: March 18, 1899, and were accepted by him. Thereby it became a condition of the contract that if said note should not be paid at its maturity, the policy sued upon should cease and determine.

Nothing ever was paid upon account of either said note or said oral promise. Said note became due on September 7, 1899, several weeks before the death of Thomas M. Lewis, and it remaining then wholly unpaid, the policy in suit thereupon immediately ceased and determined by virtue of the provisions of the contract. When said note matured and for about two weeks before its maturity, it was in the hands of the Farmers' and Mechanics' national bank, in the city of Fort Worth, Texas, for collection, of which fact
23 Thomas M. Lewis was notified; but he did not pay the same.

8.

If, notwithstanding the non-payment of the premium, it shall be finally adjudged that the policy sued on constitutes a valid and subsisting obligation of the defendant, then the defendant will be entitled to have set off against the same, the amount of the note described in the foregoing section, which, subject to the matters and things hereinbefore set out, is a debt of Thomas M. Lewis and owned by the defendant. It will also be entitled to have deducted from the amount of said policy the sum of thirty-four and $\frac{34}{100}$ dollars being the balance, over and above said note, of the first year's premium remaining unpaid.

9.

In consideration of the premises, the defendant prays that it be hence discharged without day, and that it recover from the plaintiff its costs in this behalf.

MAURICE E. LOCKE,
Attorney for Defendant.

The foregoing has the following endorsement, to wit:—
#163 Law. Lula T. Lewis *vs.* Iowa Life Insurance Co. Defendant's third amended original answer. Filed 11 day of Jan'y 1901. J. H. Finks, clerk by J. B. Finks, deputy.

21 *Defendant's 1st Supplemental Answer.*

Filed January 11th, 1901.

In the Circuit Court of the United States, Northern District of Texas, at Fort Worth.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163.

To the honorable the judges of said court:

1.

Now by its attorney comes the defendant in the above-styled cause and under leave of the court files this its first supplemental answer, and so makes answer as follows to the first supplemental petition of the plaintiff:

2.

It demurs to said supplemental petition and says that the same is not sufficient in law to constitute a reply to its third amended original answer.

3.

It denies all and singular the allegations in said supplemental petition contained.

4.

In the policy sued upon is contained, and therein expressly made a part of the contract, a provision in words and legal effect as follows: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company." S. E. Starn was neither the president nor the secretary of the defendant company, but was a soliciting agent of very limited authority. He never was authorized by the defendant to accept payment of the note of Thomas M. Lewis after its maturity. If he promised to do so, such promise was beyond the scope of his agency, contrary to his general instructions, and wholly without the defendant's knowledge or sanction. As soon as the defendant was informed that said note was past due and unpaid, and that its payment was proposed, the defendant telegraphed him not to accept the payment thereof. Neither the plaintiff nor Thomas M. Lewis ever made or tendered payment of said note. Whatever offer was made to pay the same was made by a stranger to the contract, whom said S. E. Starn had theretofore notified that he could not accept payment because the defendant had instructed him not to do so. If S. E. Starn ever promised to accept payment of said note as alleged by the plaintiff, said promise was wholly without consideration

and was withdrawn before the plaintiff acted upon it
25 Neither the plaintiff nor Thomas M. Lewis was led by such promise into any change of position.

Said note was for one-half of the first year's premium on said policy. When it matured, one-half of the first policy year had expired. Said note had then been fully earned; and the defendant had in law a perfect right to collect the same after its maturity, without thereby waiving the forfeiture of the policy.

5.

In consideration of the premises, the defendant prays as in its third amended original answer.

MAURICE E. LOCKE,
Attorney for Defendant.

The foregoing has the following endorsement, to wit:
#163. Lula T. Lewis *vs.* Iowa Life Insurance Company. Defendant's first supplemental answer. Filed 11 day of Jan'y 1901. J. H. Finks, clerk By J. B. Finks, deputy.

26 *Order Overruling Demurrers and Exceptions.*

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Texas, November Term, A. D. 1900.

LULA T. LEWIS
vs. } No. 163.
IOWA LIFE INSURANCE COMPANY.

FRIDAY, *January* 11, 1901.

On this day came on to be heard the pleadings in the above-styled cause upon demurrers and exceptions. Thereupon, the defendant duly presented its general demurrer and its special exceptions to the first amended original petition of the plaintiff, said demurrer and exceptions constituting sections 2, 3 and 4 of the defendant's third amended original answer, and its general demurrer to the plaintiff's first supplemental petition, said demurrer constituting section 2 of the defendant's first supplemental answer.

Thereupon the court having heard said demurrers and exceptions and the argument of counsel concerning the same, overruled each and all of said demurrers and exceptions.

To each of said rulings of the court the defendant then and there in open court duly took exception.

27 *Final Judgment.*

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Texas, November Term, A. D. 1900.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE CO. } No. 163.

JANUARY 12TH, 1901.

On this day this cause came on to be heard and thereupon came the plaintiff and defendant by attorneys and announced ready for trial; then came a jury of twelve good and lawful men, to wit: E. C. Dyche and eleven others, who were duly selected, empanelled and sworn according to law and after hearing the evidence, argument of counsel and charge of the court retired to consider of their verdict, and thereafter on the 12th day of January, returned into open court the following verdict, to wit:

"We the jury find for the plaintiff $3,000.00 principal of policy, $360, 12 % damages on $3,000., $500 attorneys' fees, $186. interest on $3,000 from January 1st 1900 to date.

E. C. DYCHE, *Foreman.*

"We the jury further find for the defendant and assess damages as follows: $37.00 face of note, $37.31 cash due as premium, $1.28 interest on $37.30 from March 4th 1899 to September 30th 1899.

E. C. DYCHE, *Foreman.*"

And the court having heard the verdict approves and orders same filed.

It is therefore ordered and adjudged that the plaintiff, Lula T. Lewis, do have and recover of and from the defendant, Iowa Life Insurance Company $3,000.00 principal of policy, $360.00 12 % damages on $3,000.00 $500.00 attorneys' fees, $186.00 interest on $3,000.00 from January 1st 1900 to date, aggregating the sum of four thousand and forty-six dollars, with interest from this date at the rate of six per cent. per annum; it is further ordered and adjudged that plaintiff, Lula T. Lewis recover of defendant all costs in this behalf incurred:

It is further ordered and adjudged that defendant, Iowa Life Insurance Company do have and recover of and from the plaintiff, Lula T. Lewis, the sum of $76.89 and that the judgment hereby decreed in favor of the said Lula T. Lewis in the sum of $4,046.00 be and the same is hereby credited with the amount of recovery now here adjudged in the said defendant's favor, to wit: with the sum of $76.89.

It is further ordered that the plaintiff may have execution
28 for the amount of her judgment against defendant with interest thereon, less the credit of $76.89 here decreed in defendant's favor and for all costs in this behalf incurred or expended.

It is further ordered that the officers of courts do have and recover of and from both parties respectively, the costs by them herein incurred, for which execution may issue.

29 *Order Overruling Motion for New Trial and Granting Time in Which to File Bill of Exceptions.*

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Texas, November Term, A. D. 1900.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE CO. } No. 163.

JANUARY 12TH, 1901.

On this day came on to be heard defendant's motion for a new trial, and the court after hearing the argument of counsel and considering same is of the opinion that said motion is not well taken;

It is therefore ordered and adjudged by the court that said motion be and the same is hereby overruled.

It is further ordered, that the defendant, Iowa Life Insurance Company, do have and they are hereby granted sixty days from and after January 19th, 1901, in which to prepare and file their bills of exception.

30 *Defendant's Bill of Exceptions.*

Filed February 15th, 1901.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Fort Worth.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163. Defendant's Bill of Exceptions.

1.

Be it remembered, that on the 11th and 12th days of January 1901, the above-styled cause came on to be heard before the court above named, to wit: before the Honorable Edward R. Meek, United States district judge presiding, and a jury duly empaneled and sworn, Messrs. Capps and Cantey of Fort Worth, Texas, appearing as counsel for the plaintiff, and Mr. Maurice E. Locke, of Dallas, Texas, appearing as counsel for the defendant.

Thereupon, after the pleadings had been settled, the following proceedings were had, and the following facts were proven and evidence introduced in so far as the facts and evidence are material to this bill of exceptions.

2.

Upon the issue as to whether the defendant had waived its right to proofs of the fact and cause of the death of the insured, the facts proven and evidence introduced were as follows:

The clause of policy sued upon, whereby the defendant promised to pay the sum insured, reads as follows: The Iowa Life Insurance Company "hereby promises to pay the sum of three thousand dollars to Lula T. Lewis (wife of the insured) if living; if not living, to the insured's executors, administrators or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis of Fort Worth, county of Tarrant, State of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March A. D. 1900."

The above clause is all the contract contains on the subject of proofs of death. There was no testimony concerning the furnishing or receipt of proofs of death of Thomas M. Lewis, except the
31 following: R. E. Sackett, secretary of defendant testified that "the Iowa Life Insurance Company never received proofs of the death of Thomas M. Lewis prior to the institution of this suit." Request was made of S. E. Starn for blank forms of proofs of death and Capps & Cantey wrote to the defendant as herein set forth.

The application for the policy sued upon was submitted to the defendant through its agent S. E. Starn. The nature and extent of S. E. Starn's authority, as shown by the evidence, will be exhibited in section 4 of this bill. Over the defendant's objection duly made, and its exception to the ruling of the court duly taken, upon the ground that no authority had been shown in S. E. Starn to act for the defendant in the matter of proofs of death, it was proven that a few days after the death of the insured, representatives of the plaintiff requested S. E. Starn to furnish them blanks upon which to make out proofs of the fact and cause of the death of the insured. Mr. Starn declined to furnish such blanks, and as his reason for such declination, stated that he did not consider Mr. Lewis insured in the defendant company, as his policy was lapsed. R. E. Sackett, secretary of the defendant company, testified that the defendant has blank forms of proofs of death, which it requires claimants under its policies to use in making out such proofs, and which it furnishes upon request for that purpose.

On January 4, 1900, Messrs. Capps & Cantey, who were then and thereafter the *the* attorneys of the plaintiff, wrote to the defendant a letter reading as follows:

Letter-head of Capps & Cantey.

"FORT WORTH, TEXAS, *January 4th*, 1900.

Iowa Life Insurance Co., Chicago, Ills.

GENTLEMEN: Concerning your policy No. 30140 issued to Thos. M. Lewis for $3,000, registered March 4th 1899, with Lula T. Lewis, Mr. Starns has stated to us that the company does not recognize any liability under the policy by reason of the death of Thos. M. Lewis and has refused to furnish proofs of the death. We take it, of course,

that this is the stand which the company has taken in the matter and that he does so through advices from you, though we are of the opinion that it is perhaps due to Mr. Starnes and you as well that we confer direct with the home office, and have the declination to recognize the liability or furnish proofs of death proceed from that source. We have been retained to sue on the policy and will
32 appreciate it if you will by return mail advise us of what stand you have taken in the matter.

Thanking you in advance for prompt attention, we are

Yours truly,

(Signed) CAPPS & CANTEY."

Dic. I. H.

To this letter the defendant, through its secretary, R. E. Sackett, replied on January 15, 1900, by a letter reading as follows:

Letter-head of Iowa Life Insurance Co.

"CHICAGO, *Jan. 15th*, 1900.

Messrs. Capps & Cantey, Forth Worth, Texas.

GENTLEMEN: We beg to acknowledge receipt of your favor of 4th inst., the same being in relation to a certain insurance policy issued by this company upon the life of one Thomas M. Lewis and numbered 30140.

In reply we beg to inform you that this is a matter which should properly have the attention of our general counsel, and as he has been ill for some days, and is just now leaving the city for a trip of a week or ten days we shall have to defer making further reply to your communication until his return.

Very truly yours,

(Signed) R. E. SACKETT, *Secretary.*

P."

On January 27, 1900, this action was brought in the district court of Tarrant county, Texas.

On January 31, 1900, the defendant, through E. L. Barber, its general counsel, made further reply to Capps & Cantey's letter of January 4th by a letter reading as follows:

Letter-head of Iowa Life Insurance Co.

"JAN. 31ST, 1900.

Messrs. Capps & Cantey, Fort Worth, Texas.

GENTLEMEN: Your letter of January 4th to the Iowa Life Insurance Company before me, and to which I respond simply as a matter of courtesy.

How any one could imagine that Mr. Starnes would have anything to do with furnishing or refusing to furnish proofs of death of anybody under any circumstances, connected with this company, I do not understand. I would state that it does not appear by the books of the company that Thomas M. Lewis was a policy-holder in

said company at the time of his alleged death. We are neither called upon to deny or admit any liability by reason of the fact that he may at some time have been a policy-holder in this
33 company, that I am aware of. If you or any other person desires blank forms of this company upon which proofs of death are usually made, we will furnish you them with the utmost pleasure, not for the purpose of furnishing proofs of the death of Thomas M. Lewis nor any other person, but simply as a matter of courtesy, and you will have the right to make such use of them as you desire. This, we never refuse to any person and we expressly state that in furnishing such blanks, we neither admit or deny any liability of any supposed or alleged claim in the hands of the parties asking for such blanks.

Yours, &c.,

(Signed) E. L. BARBER,
General Counsel."

No blanks for proofs of death were sent to Capps & Cantey by the defendant with either of its letters above copied or at any time.

Except for the evidence as to the extent of S. E. Starn's authority, the foregoing is a full and complete statement of all the evidence bearing upon this issue.

3.

Upon the issue as to whether the policy sued upon had ceased and determined before the death of the insured, the facts proven and evidence introduced were as follows, saving for section 4 *post*, the evidence upon the question of S. E. Starn's authority:

The first sentence of the policy sued upon, appearing upon the face thereof, reads as follows: "The Iowa Life Insurance Company, in consideration of the stipulations and agreements in the application herefor (a copy of which is hereto attached), and of the provisions and requirements upon the next page of this policy, all of which are a part of this contract; and in consideration, also, of the payment of seventy-four dollars and sixty-one cents, being the premium hereon for the first year, hereby promises to pay the sum of three thousand dollars, to Lula T. Lewis (wife of the insured) if living if not living, to the insured's executors, administrators or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis, of Fort Worth, county of Tarrant, State of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March, A. D. 1900."

Upon the second page of the policy is a provision reading as fo
lows, it being one of the provisions referred to in the sentence
34 above quoted from the face of the policy: "This policy is a contract made and to be performed in accordance with the laws of the State of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said State, and

shall not go into effect until the premium hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon payment of the premium there shall be delivered a receipt signed by the president or secretary, and countersigned by an authorized agent."

Another provision appearing upon the second page of the policy reads as follows: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company."

The policy sued upon is of the kind designated by the defendant as a "ten-year convertible term stock" policy. It is dated March 13, 1899. The annual premium thereon is $74.61.

The policy sued upon was issued in pursuance of a written and printed application therefor made by the insured under date of March 4, 1899. Said application requests the issuance of a "ten-year convertible term stock" policy, and states that the premium of $74.61 is to be paid annually. It concludes with a recital as follows: "A note for premium of $74.61 has been paid under this application, to make the insurance binding from the date hereof, on condition that if the risk is not assumed by the company this sum is to be returned, in accordance with the receipt given as voucher for said payment."

On March 4, 1899, the insured executed and delivered to S. E. Starn, as agent of the defendant, in partial settlement of his premium his note reading as follows:

"$37.30. MARCH 4TH, 1899.

Six months after date I promise to pay to the order of myself thirty-seven $\frac{30}{100}$ dollars, at Ft. Worth, Texas value received, with interest at 6 per cent. per annum.

T. M. LEWIS, M. D."

Which he endorsed in blank as follows: "T. M. Lewis, M. D."

On March 5, 1899, S. E. Starn transmitted to the defendant the insured's said application and note with a letter, which in so far as it is material to this bill of exceptions, reads as follows: "I herewith hand you application of Thomas M. Lewis for $3,000.00,
35 10-year term con. stock. Also his note to cover settlement."

These papers were received by the defendant March 8, 1899 at its office in Chicago.

The application was accepted by the defendant March 13, 1899. The defendant did not signify to Thomas M. Lewis its acceptance of his application in any way other than by making out and forwarding to its agent, S. E. Starn, for delivery the policy sued upon, and the premium receipt hereinafter mentioned, which it did on March 16, 1899.

On March 18, 1899, S. E. Starn countersigned the premium receipt, and delivered it and the policy sued upon to the insured.

The policy and receipt were delivered at the same time and were received by the insured.

Said premium receipt reads as follows:

"Iowa Life Insurance Company.

Chicago office.

Received $7.61, being the first annual premium due March 4, 1899, under policy No. 30140 on the life of Thomas M. Lewis subject to the terms of the contract and the conditions on the back hereof.

Read the notice to policy-holders on the back of this receipt.

This receipt is not binding unless it is countersigned by

(Signed) C. E. MABIE, *President.*

S. E. STARN,
Agt. Ft. Worth, Tex."

"Countersigned this 18th day of March 1899.

S. E. STARN."

(On back of receipt.)

"For terms of mutual agreement, see application and policy.

Notice to Policy-holders.

This receipt, to be valid, must be signed by the President or secretary of the company, and in exchange therefor, cash or its equivalent, be given by the holder of the policy, on or before date payment is due and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

For the first annual premium, the insured gave the above-described note for $37.30 and agreed to perform professional services for S. E. Starn to the value of the remaining $37.31. Starn was to furnish professional work to be done by Dr. Lewis in the examination of applicants for insurance and otherwise, and Dr. Lewis was to
36 do it and let Starn have the fees. No work ever was done and no money ever was paid to S. E. Starn or the defendant in pursuance of this verbal arrangement. Except that the note was given and the verbal agreement made, as just above stated, the defendant never received, and the insured never paid, anything upon account of the premium for the policy sued upon. S. E. Starn testified that before the issuance of the policy he reported to the defendant his agreement with Dr. Lewis concerning the payment of the premium.

The policy sued upon is in the form always used by the defendant in making contracts of insurance of the kind designated by it "ten-year convertible term stock" contracts. At the time of issu-

ing said policy it was the defendant's universal practice to issue with its policies premium receipts in form like the one delivered to the insured in this case.

The defendant never sold or transferred the note received by it from the insured, but continued to be the owner thereof until the time of the trial. Some time before its maturity, the defendant sent said note to S. E. Starn for collection. S. E. Starn deposited it for collection with the Farmers' & Mechanics' National Bank of Fort Worth, Texas, on August 24, 1899. The bank held the note until September 25, 1899, when it returned it unpaid to S. E. Starn. The manager of its collection department testified that it would have accepted payment of the note at any time before its return to S. E. Starn, and that it had received no instructions from S. E. Starn with reference to the acceptance of payment after maturity.

S. E. Starn made no effort to collect the note before its maturity except that he deposited it in the bank for that purpose, nor had he up to that time furnished any professional work for the insured to do, in pursuance of the verbal agreement, or made any effort to get the insured to do any work, or pay any money on account of such agreement.

About September 29th 1899 S. E. Starn called at the residence of the insured in Fort Worth (he being at the time confined to his bed from illness, the nature of which was typhoid fever, and from the effects of which he died October 7th) and there had an interview with the plaintiff and the insured. Concerning this interview the evidence is conflicting. The evidence introduced by the plaintiff tended to prove that Starn stated that he had called for the purpose of collecting the note, that the plaintiff promised that it should be fixed up at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1st following. The evidence was sufficient to have supported a verdict that this was a fact. Mr. Starn denied that he called for the purpose of collecting the note, and denied that he had made the statement that the note could be paid at any time before October 1st, or the date on which he would make his report to the defendant.

37

Dr. Green, one of the physicians attending the insured, met Mr. Starn as the latter was coming out of the plaintiff's house. Starn inquired of the doctor if he intended returning to the city after seeing his patient. Being answered in the affirmative, Starn stated that he would wait in the doctor's buggy and go uptown with him. While the doctor was in the house the plaintiff requested him to call on J. R. Reeves at the latter's pharmacy and ask him to pay off the insured's note for them, held by Starn; the doctor agreeing to do so. Dr. Green and S. E. Starn rode in the former's buggy from the plaintiff's residence to the business portion of the city of Fort Worth. Mr. Starn left the buggy as soon as the business portion of city was reached and Dr. Green drove immediately to Reeves' pharmacy and indicated to him the plaintiff's request. Mr. Reeves agreed to pay off the note as requested, and the doctor agreed to notify Starn.

Concerning the conversation which ensued between Dr. Green and Mr. Starn on the way to town, the evidence is conflicting. Dr. Green testified that Mr. Starn stated that he had called at the plaintiff's house to collect the note. Mr. Starn denied having made such statement.

Some time during the afternoon of this day Dr. Green notified S. E. Starn that J. R. Reeves, the druggist, would pay off the note. Concerning the conversation which occurred between Dr. Green and Starn immediately following this notification, the evidence is conflicting. Dr. Green testified that Starn said he would go down to the pharmacy for that purpose; that some statement was made about his going to Reeves' pharmacy to get the money that evening, and that Starn said it would not be necessary, that he would go down by nine or ten o'clock the next morning. S. E. Starn testified that he stated to Dr. Green that he would call and see Mr. Reeves the next morning.

The night following this interview Mr. Starn sent to the defendant a night-rate telegram, reading as follows:

"FORT WORTH, TEXAS, *September* 29, '99.

Iowa Life Ins. Co., Chicago:

Dr. T. M. Lewis offers to pay premium today. Very sick. Shall I receive it?

S. E. STARN."

38 The next morning September 30th 1899, the defendant through its secretary telegraphed to S. E. Starn as follows:

"To S. E. Starn, 615 Grove St., Fort Worth, Texas:

Do not accept payment on note due September 4th. Answer.

R. E. SACKETT, *Sec.*"

On the same day defendant wrote to S. E. Starn a letter reading as follows:

"Mr. S. E. Starn, 615 Grove St., Fort Worth, Texas.

DEAR SIR: We are in receipt of your telegram as follows: 'Dr. T. M. Lomis offers to pay premium today. Very sick. Shall I receive it?' to which we replied as follows: 'Do not accept payment of note due September 4th. Answer.' We presume this telegram refers to policy No. 30140, Thomas M. Lewis $3,000, convertible term, premium $37.60, upon which note was received at this office in the sum of $37.30, due September 4th, 1899, and which was sent to you for collection.

Very truly yours, R. E. SACKETT, *Sec.*"

Some time in the morning of September 30th 1899, S. E. Starn called at the pharmacy of J. R. Reeves and Mr. Reeves informed him that he had the money to pay off the Lewis note and had been waiting for him. Mr. Starn thereupon informed Mr. Reeves that he could not accept the payment of the note because he had received a telegram from the company instructing him not to do so. Later

in the day Mr. Reeves and Dr. Green called on Mr. Starn and Reeves made a tender of the amount of the note, which Starn refused to accept. Reeves kept the money he tendered to Starn and did not pay or deliver same to the plaintiff or the insured or to any one for them and had no interview with the plaintiff or the insured.

On the same day Starn telegraphed the defendant as follows:

"FORT WORTH, TEXAS, *September 30th*, '99.

Iowa Life Ins. Co., Chicago:

I have refused payment on Lewis policy this 10.30 a. m.

S. E. STARN."

The only testimony with regard to any consideration for the promise claimed by the plaintiff to have been made to her by S. E. Starn that he would accept payment of the note, is the following passage from the cross-examination of the plaintiff:

39

Q. Did you pay Mr. Starn anything?

A. No sir.

Q. He simply told you he had come to see the doctor about his note, and that it ought to be fixed up, and you said you would attend to it?

A. Yes sir.

Q. That is all that occurred between you?

A. Yes sir.

The attention of the plaintiff was not directed to the fact that she was being questioned concerning a consideration for the extension of the time for payment of note other than is indicated by the questions put to her.

At the request of the defendant, S. E. Starn returned to it the note of the insured, which thereafter continued in the defendant's possession. The defendant never offered to return the note to the insured and never before the death of the insured, did anything in the way of an affirmative forfeiture or cancellation of the policy, and no communication passed between the defendant and S. E. Starn regarding said note between the transmission of the note to Starn for collection and Starn's above-quoted telegram of September 29, 1899.

Except for the evidence upon the question of the extent of S. E. Starn's authority the foregoing is a full statement of all material facts upon the issue of the forfeiture of the policy sued upon for non-payment of the premium note, and the waiver of such forfeiture.

4.

Upon the question as to whether S. E. Starn had power to waive proofs of death and power to waive the forfeiture of the policy for non-payment of the premium note, the facts proven and evidence introduced were as follows:

One of the provisions of the policy reads as follows: "All agreements made by this company are signed by the president or secre-

tary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company." S. E. Starn was neither the president nor the secretary of the defendant company. He was an agent of the defendant, and at the dates of all the transactions involved in this litigation, he was acting as such agent by virtue of a written contract between himself and the defendant, made October 1, 1898. The portions of said contract material to this bill of exceptions read as follows:

40 "The said party of the first part doth hereby constitute and appoint the said party of the second part its agent to solicit applications for life insurance throughout the State of Texas and to collect the first year's premiums thereon, and with full power and authority to appoint agents, under the supervision of and subject to the acceptance of said company, in any portion of the State of Texas not exclusively granted to some other agent under contract. It is hereby understood that the said party of the second part is not given exclusive control of the territory above mentioned, beyond the right and privilege to solicit business and appoint agents to do so under the supervision and approval of said party of the first part." * * *

"The said party of the first part agrees to allow the said party of the second part, as a remuneration for his services, the following commissions and renewals on all business procured by himself and through agents appointed by him, viz:

List of Commissions on First Premiums.

* * * * * * *

Convertible-term policies less than $5,000 65 %.

* * * * * * *

A renewal commission of seven and one-half (7½) per cent. shall be allowed on ten annual renewal premiums on all business except convertible-term and renewable-term policies less than $5,000 which shall bear a renewal of 5 %." * * *

"Commissions shall accrue only as premiums are paid in cash to the said party of the first part. In all cases where notes or other obligations are accepted in payment for any premium, no commission shall accrue or become due until said notes are paid in cash to said party of the first part. If premiums are payable quarterly commission shall be computed quarterly on quarterly premiums; if payable semi-annually commission shall be computed semi-annually on semi-annual premiums. Commission shall in no case be allowed upon any part of a premium before the same is collected." * * *

"The party of the second part shall not make, alter or discharge any contracts, or waive forfeitures, grant permits, or bind the said party of the first part in any manner not herein expressly authorized." * * *

"The said party of the second part agrees to submit to and abide by all rules and regulations of said company." * * *

"A report shall be made upon the fifth day of each month on the business done during the preceding month, and the amount due the said company for first premiums or renewals collected by
41 the said party of the second part shall then be reported to said company."

R. E. Sackett, secretary of the defendant, testified that the defendant company had printed rules and instructions which it regularly issued to its agents. S. E. Starn and R. E. Sackett testified that at the times of all the transactions involved in this litigation, the agent S. E. Starn had no authority other than that conferred by said contract and said rules and instructions. The portions of said rules and instructions material to this litigation are as follows:

"Authority of agents.—Agents are empowered to solicit and receive applications for policies of life insurance, to collect the first premiums upon such applications and to deliver policies when the required premiums have been paid thereon; also to collect renewal premiums upon receipts signed by the president or secretary, and sent to them for that purpose. Agents are not authorized to collect any renewal premium after the day on which the same becomes due, except in accordance with special instructions from the company in each individual case. No policy will be binding upon the company until the premiums due shall have been actually paid.

"Agents are not authorized to make, alter or discharge contracts, waive forfeitures, name an extra rate for special risks, grant permits or bind the company in any manner whatsoever. No agent is authorized to incur any expense against the company except by special authority.

"All agreements or obligations of the company are signed by its president or secretary.

"All moneys of the company, collected on its account by the agent, are held by him in trust, and must be kept separate and intact and promptly remitted by him in accordance with his contract and the rules and instructions of the company."

"Agents' reports.—A full report of all business done by agents during any month shall be made to the company on or before the fifth day of the succeeding month, upon the regular printed report blanks to be furnished by the company, at which time remittance shall be made covering all policies mentioned in said report, together with any renewal collections which may have been made, making such deductions only as are allowed under the contract. New policies may be delivered if paid for within thirty days from the date when received by the agent, and a re-examination may be waived, provided the insured is in good health; but the foregoing permission may be countermanded in any case. A receipt covering
42 the first premium will be sent with every policy. This receipt must be countersigned by the agent designated, and when delivered to the applicant the amount named in the receipt must be accounted for by the agent in his next report. Great care should be exercised by agents in delivering these receipts, as they will be held to strict account as to their disposal."

"Premiums and commissions.—Agents are authorized to receive premiums not overdue, only, however, when they have the company's regular receipts, signed by an officer of the company, to give in exchange for such premiums. Agents are not authorized to write receipts for premiums.

"Agents are prohibited from delivering any renewal receipt and from accepting the premium for same, after the day on which said premium falls due, unless the person whose life is insured is, at the time of such payment, in good health, of temperate habits and in insurable condition, evidence of which must be furnished to and accepted by the company before the receipt for premium is delivered. Interest must be collected on all overdue premiums received, and reported in account under 'interest.'

"Commissions are to be charged only as premiums are paid in cash to the company."

"Restoration of lapsed policies.—When a policy has lapsed through non-payment of premium, note or interest, the agent has no authority to restore it. The company reserves the right to decide in all such cases, and always requires satisfactory proof of the non-impairment of the risk. If a policy shall have been lapsed for more than thirty days, a new medical examination may be required, the fee for which must be paid by the policy-holder or agent. Within thirty days from date of lapse a certificate of health upon one of the company's blanks may be accepted in lieu of a new examination, at the option of the company."

R. E. Sackett, secretary of the defendant company, testified that on September 29th and 30th 1899, the above-mentioned written contract between the company and its agent Starn was still in force, and that it had not in any way been modified or added to before said dates. He testified that the defendant company never at any time in any way authorized said S. E. Starn to receive payment of the above-mentioned note of the insured after its maturity. He testified that the defendant company never accepted payment of past-due premiums or past-due premium notes upon account of policies insuring the lives of persons known by the company to be in bad health at the time of acceptance of such payment, and that it never per-
43 mitted any of its agents to accept payment under such circumstances, and never kept money so paid with knowledge of such circumstances. He testified that no duties ever had been imposed or any authority conferred upon S. E. Starn with relation to demanding or waiving proofs of death, or with reference to deciding whether the defendant was or was not liable to pay any specified policy of insurance. He testified that the above-mentioned contract covers all the duties and authority of S. E. Starn as an agent of the defendant. S. E. Starn testified that the defendant never, by way of contract, letter, rules, or otherwise, gave him any general instructions about receiving payment of past-due notes, except such instructions as were contained in his contract and the printed rules and instructions above mentioned, and that what appears in said contract and printed rules and instructions constituted the sum total of his authority. He testified that the defendant never at any time

wrote him to accept payment of the note of the insured after maturity.

At the lower left-hand corner of the application for the policy sued upon appear the following words, all being a portion of the printed blank, except the name of the subscribing agent:

"This risk is approved and recommended by

____ ____,
Soliciting Agent.

(Signed) S. E. STARN,
General Agent."

A copy of the application, including said words, was attached to the policy. S. E. Starn's letter of March 5, 1899, to the defendant company, transmitting the application of Dr. Lewis for the policy, was written on a letter-head of the defendant company, upon which the following words had been printed in red ink:

"S. E. Starn, dist. manager,
615 Grove street,
Ft. Worth, Texas."

It was not shown that this letter-head or any similar one ever had been seen by the insured or the plaintiff.

The telegraphic and mail correspondence between S. E. Starn and the defendant regarding payment of the note has been copied at length in section 3 above, and need not be recopied here.

S. E. Starn testified that if he had collected the note of the insured he would have retained and would have had the right to retain, his commission of 65 % thereof, and sent the remaining 35 % to the defendant, and that if he had collected anything on account of the verbal contract between himself and Dr. Lewis, he would have retained, and would have had the right to retain, 65 % of the amount collected, and sent the remaining 35 % to the defendant.

44 The foregoing, together with the correspondence between S. E. Starn and the defendant, quoted in section 3 above, constitutes a full statement of all material evidence introduced upon the question of the extent of S. E. Starn's authority to act for the defendant.

5.

Except by the institution of this action, the plaintiff never at any time made demand upon the defendant for payment of the sum due her on account of the contract of insurance. She had, however, made such requests for blank forms for proofs of death and received such responses to her requests, as are set forth in section 2 of this bill.

6.

Exception No. 1.

While the witness S. E. Starn was on the stand, counsel for the defendant asked him the following question: "When you took this application and delivered this policy, what conversation, if any, did

you have with Dr. Lewis about the receipt that you gave him?" To this question counsel for the plaintiff objected, upon the ground that the matter inquired about was irrelevant and immaterial and could not affect the terms of the contract. The court announced that he thought the objection well taken. Thereupon counsel for the defendant offered to prove by the witness upon the stand that before the delivery of the policy and receipt, the form of contract which Dr. Lewis was to receive was fully discussed between the witness and Dr. Lewis, and it was agreed and understood that as a part of his contract of insurance, he should receive a receipt in the form of the premium receipt that was delivered to him, and which appears in evidence. The court refused the offer, and sustained the objection to the question; to which ruling of the court the defendant then and there duly took exception.

7.

Exception No. 2.

The court in its charge to the jury, after summarizing the evidence, proceeded as follows:

"The first question to dispose of is as to whether or not the provision as to the payment of the note at maturity—it being provided on the back of the receipt for the note that the policy shall cease and determine if the note is not paid at maturity, is a provision of the contract entered into by and between the Iowa Life Insurance Company and Thomas M. Lewis; whether Lewis and his beneficiary are to be bound by that provision on the back of the receipt as a part of the policy of insurance.

"The question is not without its difficulties, but from the light which I have before me, and after listening to the argument
45 of counsel, I am of the opinion that the provisions on the back of the receipt are not a part of the contract; that the contract by its own explicit terms, is wholly included in the policy—the life insurance proper, and in the application for such life-insurance policy, which, by the terms of the policy is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement between the parties as to the provision upon the back of the receipt. Such provision is nowhere noted in the face of the contract of insurance; it is nowhere noted in the application for the insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere.

"Even if this provision were considered a part of the contract entered into between the parties, yet it is such a provision as to be

taken advantage of would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity the company should have within a reasonable time thereafter notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that any such action was taken on the part of the insurance company. It has been held by authority of weight and respectibility that this would be the necessary steps for the insurance company to take, were the provision which is contained on the back of this receipt, contained in the face of the note given by the insured to the company in part payment of the premium. I can understand why the insured should be bound by provisions incorporated in the face of his note, because that note bears his signature and in so far as it bears his signature it must be his act, and therefore, he himself has agreed to the provision. He signs his own note understandingly and wittingly. Even in that case, however as I have stated, the law as it has been held by courts of weight and authority, is that the company must notify the insured of the non-payment of the note and that the policy, because of such non-payment has ceased and determined, and that they will no longer be liable thereunder.

46 "Therefore, on the first branch of this case, or rather the first question, the court has reached the conclusion that the fact that the assured did not upon the maturity of the note pay it, does not lapse the policy, and that it was in effect thereafter. It seems to me that the attitude of the company itself bears out this conclusion, because it being the possessor of the note, with knowledge of the date of its maturity, placed it in the hands of a local bank for collection and permitted it to remain there after the date of its maturity, with the bank making its usual and customary efforts to collect the same. This was done with the tacit consent of its agent, Mr. Starns, to whom the note was sent for collection. This note, as has also been said by counsel, is of the highest negotiable character and needed only the solvency of the individual whose name was appended thereto, to make it as good as currency."

To said charge of the court the defendant then and there in open court before the jury retired to consider of its verdict, duly excepted upon each of the several grounds next hereinafter stated, to wit:

(*a.*) It excepted to so much of said charge as relates to the question of whether the provision for forfeiture upon the back of the receipt given for the premium is a part of the contract and binding upon the plaintiff; because in law said provision is a part of the contract and is binding upon the plaintiff.

(*b.*) It excepted to so much of the charge of the court as instructs the jury that if the provision for forfeiture on the back of the receipt given for the premium were a part of the contract, it would be necessary for the defendant to take some affirmative action in forfeiting the policy, and to notify the insured that forfeiture was claimed; because said provision is a part of the contract and entitles the defendant to have the policy considered forfeited by virtue of the non-

payment of the premium note at its maturity, without affirmative action on the defendant's part; and further because it appeared from the undisputed evidence that the premium note represented a little less than half of the amount of the first annual premium and that at the maturity of the note a little more than half of the first policy year had expired, and that therefore the note had been fully earned, and the defendant was entitled to keep it and collect it, and at the same time enforce forfeiture for its non-payment at maturity.

8.

Exception No. 3.

47 The court in its instruction to the jury, after charging upon the subject of forfeiture, as shown in exception No. 2, proceeded as follows:

"There is a provision in the face of the contract of insurance that satisfactory proof of the fact and cause of the death of the insured must be received and accepted at the company's office in Chicago, Ills., under certain conditions and within the terms of the policy, before its liability will attach.

"I have narrated in a somewhat desultory manner, the evidence as to furnishing proof of loss, and it seems to me that under the terms of the contract of insurance, the company is made the judge of what shall be satisfactory proofs of death. The company says that upon receipt of satisfactory proof of the fact and cause of death, its liability will attach, in event it is liable under other conditions of the policy. It must determine for itself what it will accept as satisfactory proof. Therefore it best knows what its regulations are as to proof of death. The attitude of the company in this respect (and I am not referring to the attitude of its agent Mr. Starns in Ft. Worth) but of the secretary and general counsel of the company, who unquestionably acted as its full representatives and agents; their attitude on the matter of proof of loss is such as to here in this case estop the company from setting up the absence of this proof of loss as a defense—setting up that proofs of loss have not been furnished, and that therefore, their liability does not attach. When they are called upon to say whether or not they deny liability under this policy, and if not, to permit the representatives of the deceased to make proofs of loss, they practically refused to furnish blanks for that purpose, and the general counsel says there is no such policy in effect on the books of the company. Construing the statement of their letters in a fair way, they are tantamount, to my mind, to refusing liability on this policy, and certainly one would feel it futile to go ahead thereafter and make proof of loss under the circumstances the beneficiary did, not knowing what the company would construe as satisfactory proof. It seems to me as a question of law, that the insurance company should be estopped from here setting up that provision of the policy as a defense to this action."

To said charge of the court the defendant then and there in open court, before the jury retired to consider of its verdict, duly excepted, upon the ground that there was no evidence before the court

proper to serve as the foundation for a verdict that the defendant had waived its right to require the furnishing of proofs of death in accordance with the contract, or been estopped from enforcing such right.

48 9.

Exception No. 4.

The court in its instruction to the jury, after charging as shown in exception Nos. 2 and 3, proceeded as follows:

"This being the view of the court, it will be your duty to return a verdict for the plaintiff for the face of the policy, which is three thousand dollars, and also interest thereon at the rate of six per cent. per annum from the first day of January 1900, and also 12 per cent. penalty on the three thousand dollars—not on three thousand dollars and six per cent. added thereto, but 12 per cent. penalty on three thousand dollars. Also for reasonable attorneys' fees for the prosecution of this suit, basing your judgment of course, on the evidence which has been introduced on that point.

"This, therefore, leaves to the jury but one question to determine, this the fixing of reasonable attorneys' fees for the prosecution of this suit."

To said charge of the court the defendant then and there in open court, before the jury retired to consider of its verdict, duly excepted, upon each of the several grounds next hereinafter stated, to wit:

(*a.*) It excepted to so much of the charge as instructs the jury to return a verdict for 12 per cent. damages and reasonable attorneys' fees; because the statute, article 3071 of the Revised Statutes of Texas, which alone purports to require such payment, is not a valid law, and binding upon the defendant, for the reason that it is in contravention of the fourteenth amendment to the Constitution of the United States, in that it denies to the defendant, which is a person within the jurisdiction of the State of Texas, the equal protection of the law.

(*b.*) It excepted to so much of the charge as instructs the jury to return a verdict for 12 per cent. damages and reasonable attorneys' fees; because there was no evidence before the court showing that the plaintiff at any time before or after the institution of the suit, or otherwise than by the mere fact of suit, made demand upon the defendant for the payment of the amount due under the policy sued upon.

(*c.*) It further excepted to so much of the charge as instructs the jury to return a verdict in favor of the plaintiff for reasonable attorneys' fees for the prosecution of the suit; because there was no pleading or evidence before the court showing that the plaintiff had paid any attorneys' fees, or become liable to pay any attorneys' fees; or if she had paid them, or become liable to do so, to what amount.

49 10.

Exception No. 5.

Before the case was submitted to the jury the defendant, in writing, requested the court to give to the jury its special charge No. 1, in words as follows:

"You are instructed that under the undisputed evidence the plaintiff is not entitled to recover, and that therefore you should return a verdict for the defendant."

The court refused to give said charge and to such refusal the defendant in open court duly notes its exception, after the jury had received the charge of the court, and before it retired to consider of its verdict.

11. The defendant presents the foregoing as its bill of exceptions in the above-styled cause, and prays that it be settled and allowed, and duly signed and made a part of the record of the cause.

MAURICE E. LOCKE,
Attorney for Defendant.

The time for the settling and allowance of the defendant's bill of exceptions having been extended by order of court made during the term and immediately upon the conclusion of the trial, and the period of such extension not having yet elapsed, and the foregoing bill of exceptions having been examined and found correct, the same is hereby settled, allowed and ordered filed as a part of the record of the cause, this the 13 day of February A. D. 1901.

EDWARD R. MEEK,
United States District Judge, Presiding.

The foregoing has the following endorsement, to wit:

163 Lula T. Lewis *vs.* Iowa Life Insurance Company. Defendant's bill of exceptions. Filed 15 day of Feb. 1901. J. H. Finks, clerk by J. B. Finks, deputy.

50 *Defendant's Petition for Writ of Error and Allowance Thereof.*

Filed February 15th, 1901.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Fort Worth.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163.

Defendant's petition for a writ of error.

To the honorable the judges of the circuit court of the United States for the northern district of Texas:

Now by its attorney comes Iowa Life Insurance Company, the defendant in the above-styled cause, and shows that on to wit: January 12, 1901, the said circuit court entered a judgment against it in said cause, in pursuance of the verdict of the jury therein rendered,

and further shows that in said cause the defendant claimed that a law of the State of Texas, to wit: article 3071 of the Revised Statutes of said State, was in contravention of the Constitution of the United States, and that its said claim was denied by the court.

Wherefore, feeling itself aggrieved by said verdict and judgment, the defendant files with this petition an assignment of errors complained of, and prays for an order of court, allowing it to prosecute a writ of error to the Supreme Court of the United States, and fixing the amount of security which the defendant shall give upon said writ of error, and providing that upon the giving of a supersedeas bond for said amount, all further proceedings in said circuit court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

MAURICE E. LOCKE,
Attorney for Defendant.

Granted, this the 15th day of February A. D. 1901.

EDWARD R. MEEK,
United States District Judge, Northern District of Texas.

The foregoing has the following endorsement, to wit:
163 Lula T. Lewis *vs.* Iowa Life Insurance Company. Defendant's petition for a writ of error. Filed 15 day of Feb. 1901. J. H. Finks, clerk by J. B. Finks, deputy.

51 *Order Allowing Writ of Error and Fixing Bond.*

Filed February 15th, 1901.

In the Circuit Court of the United States, Northern District of Texas, Sitting at Fort Worth.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163.

Order allowing writ of error and fixing bond.

On this, the 15th day of February 1901, came Iowa Life Insurance Company, the defendant in the above-styled cause, by its attorney, and presented its petition filed in said cause for the allowance of a writ of error intended to be urged by it in the Supreme Court of the United States, and for the fixing of the amount of security to be given by the defendant upon said writ of error, the same to operate as a supersedeas.

Whereupon, said petition having been considered, and the allegations therein contained having been found to be true, a writ of error is allowed as prayed for, upon the defendant giving bond in accordance with law in the sum of eight thousand dollars, which shall operate as a supersedeas bond; and it is ordered that upon the defendant's giving an approved bond for said amount and otherwise complying with the requirements of the law in such behalf, all fur-

ther proceedings in said circuit court shall be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

EDWARD R. MEEK,
United States District Judge for the Northern District of Texas.

The foregoing has the following endorsement, to wit:

≠163 Lula T. Lewis *vs.* Iowa Life Insurance Company. Order allowing writ of error and fixing bond. Filed 15 day of Feb. 1901. J. H. Finks, clerk by J. B. Finks, deputy.

52 *Defendant's Writ of Error Bond.*

Filed February 15th, 1901.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Fort Worth.

LULA T. LEWIS
vs.
IOWA LIFE INSURANCE COMPANY. } No. 163.

Defendant's bond on writ of error.

Whereas, in the above-styled cause, then pending in the circuit court of the United States for the northern district of Texas, sitting at Fort Worth, said court did, on to wit: January 12, 1901, render in the plaintiff's favor, and against defendant, a money judgment for the sum of four thousand forty-six dollars, less a credit of seventy-six and $\frac{89}{100}$ dollars, with interest thereon from said date at the rate of six per cent. per annum, and all costs of suit.

And whereas, the said defendant, Iowa Life Insurance Company, has sued out a writ of error to the Supreme Court of the United States to reverse the said judgment above described:

Now, therefore, know all men by these presents: that the said defendant, Iowa Life Insurance Company, a private corporation, as principal, and as surety, the United States Fidelity and Guaranty Company, a private corporation having its domicile in Baltimore, Maryland, and authorized by its charter and by compliance with the laws of the State of Texas to do business as a surety company in Texas, do hereby acknowledge themselves jointly and severally bound to pay to the plaintiff, Lula T. Lewis, or to her executors, administrators or assigns, the sum of eight thousand dollars.

The condition of this bond, however, is such, that if said Iowa Life Insurance Company shall prosecute its writ of error to effect, and, if it shall fail to make its plea good, shall answer all damages and costs, then this bond shall become null; otherwise, it shall remain in full force and effect.

In testimony whereof, said Iowa Life Insurance Company has caused these presents to be signed in its name and behalf by Maurice E. Locke, its attorney of record and agent thereunto duly authorized,

and said The United States Fidelity and Guaranty Company has caused these presents to be signed and its corporate seal to be affixed in its name and behalf by Webster Snyder and Sam. A. Leake, its attorneys-in-fact, thereunto duly authorized, all at Dallas, Texas, this the 15th day of February, A. D. 1901.

53 IOWA LIFE INSURANCE COMPANY,
By MAURICE E. LOCKE,
Its Agent and Attorney.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By WEBSTER SNYDER,
[SEAL.] SAM. A. LEAKE, *Its Attorneys-in-fact.*

The foregoing bond is examined and approved as a supersedeas bond, and ordered filed, this the 14th day of February, A. D. 1901.
EDWARD R. MEEK,
United States District Judge for the Northern District of Texas.

(15c. revenue stamps affixed and canceled.)

The foregoing has the following endorsement, to wit:
163 Lula T. Lewis *vs.* Iowa Life Insurance Company. Writ of error bond. Filed 15 day of Feb. 1901. J. H. Finks, clerk By J. B. Finks, deputy.

54 *Assignment of Errors.*

Filed February 15th, 1901.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Fort Worth.

LULA T. LEWIS
vs. } No. 163.
IOWA LIFE INSURANCE COMPANY.

Defendant's assignment of errors.

In connection with its petition for a writ of error to the Supreme Court of the United States, this day filed in the above-styled cause, the defendant, Iowa Life Insurance Company, assigns the following errors, which it says occurred in the trial of said cause by the said circuit court:

1. The court erred in overruling the defendant's first special exception to the plaintiff's first amended original petition, said exception constituting section 3 of the defendant's third amended original answer.

2. The court erred in overruling the defendant's second special exception to the plaintiff's first amended original petition, said exception constituting section 4 of the defendant's third amended original answer.

3. The court erred in refusing to permit the defendant to prove by the witness S. E. Starn, that before the delivery of the policy

sued upon, and the premium receipt which accompanied the same, the form of the contract of insurance which the insured was to receive was fully discussed between himself and said witness, and that it was agreed and understood that as a part of his contract of insurance the insured was to receive such a receipt as was delivered to him, all as shown by the defendant's exception No. 1.

4. The court erred in refusing to give to the jury the defendant's requested special charge No. 1, in words as follows:

"You are instructed that under the undisputed evidence the plaintiff is not entitled to recover, and that therefore you should return a verdict for the defendant."

Said refusal is erroneous, because, under the undisputed evidence, the defendant was entitled to have a verdict directed in its favor.

5. The court erred in charging the jury in words as follows:

"The first question to dispose of is as to whether or not the provision as to the payment of the note at maturity—it being provided on the back of the receipt for the note that the policy shall cease and determine if the note is not paid at maturity, is a pro-
55 vision of the contract entered into by and between the Iowa Life Insurance Company and Thomas M. Lewis; whether Lewis and his beneficiary are to be bound by that provision on the back of the receipt as a part of the policy of insurance.

"The question is not without its difficulties, but from the light which I have before me, and after listening to the argument of counsel, I am of the opinion that the provisions on the back of the receipt are not a part of the contract; that the contract, by its own explicit terms, is wholly included in the policy—the life insurance proper and in the application for such life-insurance policy, which, by the terms of the policy is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement between the parties as to the provision upon the back of the receipt. Such provision is nowhere noted in the face of the contract of insurance, it is nowhere noted in the application for insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere.

"Even if this provision were considered a part of the contract entered into between the parties, yet it is such a provision, as to be taken advantage of would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity, the company should have within a reasonable time thereafter, notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that any such action was taken

on the part of the insurance company. It has been held by authority of weight and respectability, that this would be the necessary steps for the insurance company to take, were the provision which is contained on the back of this receipt contained in the face of the note given by the insured to the company in part payment of the premium. I can understand why the insured should be bound by provisions incorporated in the face of his note, because that note bears his signature, and in so far as it bears his signature it must be his act, and therefore, he himself has agreed to the provision.
56 He signs his own note understandingly and wittingly. Even in that case, however, as I have stated the law as it has been held by courts of weight and authority, is that the company must notify the insured of the non-payment of the note, and that the policy, because of such non-payment has ceased and determined, and that they will no longer be liable thereunder.

"Therefore, on the first branch of this case, or rather the first question, the court has reached the conclusion that the fact that the assured did not upon the maturity of the note pay it, does not lapse the policy, and that it was in effect thereafter. It seems to me that the attitude of the company itself bears out this conclusion, because it being the possessor of the note with knowledge of the date of its maturity, placed it in the hands of a local bank for collection and permitted it to remain there after the date of its maturity, with the bank making its usual and customary efforts to collect the same. This was done with the tacit consent of its agent, Mr. Starns, to whom the note was sent for collection. This note, as has also been said by counsel, is of the highest negotiable character and needed only the solvency of the individual whose name was appended thereto, to make it as good as currency."

Said charge was erroneous for each of the following reasons, to wit:

(*a.*) In law the provision for forfeiture contained upon the back of the receipt given to the insured for his premium was a part of the contract between himself and the defendant, and binding upon the plaintiff.

(*b.*) The provision for forfeiture upon the back of the premium receipt given to the insured was a part of the contract, and by its terms entitled the defendant to have the policy considered forfeited by virtue of the non-payment of the premium note at its maturity, without affirmative action on the defendant's part.

(*c.*) It appears from the undisputed evidence that the premium note represented a little less than half of the amount of the first annual premium, and that at the maturity of the note a little more than half of the first policy year had expired; wherefore, the note had been fully earned and the defendant was entitled to keep it and collect it, and at the same time enforce forfeiture for its non-payment at maturity.

6. The court erred in charging the jury in words as follows:

"There is a provision in the face of the contract of insurance that satisfactory proof of the fact and cause of the death of the insured

must be received and accepted at the company's office in Chi-
57 cago, Ills., under certain conditions and within the terms of the policy, before its liability will attach.

"I have narrated in a somewhat desultory manner, the evidence as to furnishing proof of loss, and it seems to me that under the terms of the contract of insurance, the company is made the judge of what shall be satisfactory proofs of death. The company says that upon receipt of satisfactory proof of the fact and cause of death, its liability will attach, in event it is liable under other conditions of the policy. It must determine for itself what it will accept as satisfactory proof. Therefore, it best knows what its regulations are as to proof of death. The attitude of the company in this respect (and I am not referring to the attitude of its agent, Mr. Starns, in Ft. Worth), but of the secretary and general counsel of the company, who unquestionably acted as its full representatives and agents; their attitude on the matter of proof of loss is such as to here in this case estop the company from setting up the absence of this proof of loss as a defense—setting up that proofs of loss have not been furnished, and that therefore their liability does not attach. When they are called upon to say whether or not they deny liability under this policy, and if not, to permit the representatives of the deceased to make proofs of loss, they practically refuse to furnish blanks for that purpose, and the general counsel says there is no such policy in effect on the books of the company. Construing the statements of their letters in a fair way, they are tantamount, to my mind, to refusing liability on this policy and certainly one would feel it futile to go ahead thereafter and make proof of loss under the circumstances the beneficiary did, not knowing what the company would construe as satisfactory proof. It seems to me as a question of law, that the insurance company should be estopped from here setting up that provision of the policy as a defense to this action."

Said charge was erroneous, because there was no evidence before the court proper to serve as a foundation for a verdict that the defendant had waived its right to require the furnishing of proofs of death, in accordance with the contract, or been estopped from enforcing such right.

7. The court erred in charging the jury in words as follows:

"This being the view of the court, it will be your duty to return a verdict for the plaintiff for the face of the policy, which is three thousand dollars, and also interest thereon at the rate of six per cent. per annum from the first day of January 1900, and also 12
per cent. penalty on the three thousand dollars—not on three
58 thousand dollars and six per cent. added thereto, but 12 per cent. penalty on three thousand dollars. Also for reasonable attorneys' fees for the prosecution of this suit, basing your judgment, of course, on the evidence which has been introduced on that point.

"This, therefore, leaves the jury but one question to determine, this the fixing of reasonable attorneys' fees for the prosecution of this suit."

Said charge was erroneous for each of the following reasons, to wit:

(*a.*) Article 3071 of the Revised Statutes of Texas, which alone purports to require from the defendant the payment of damages and attorneys' fees, is in contravention of the fourteenth amendment to the Constitution of the United States, in that it denies to the defendant, which is a person within the jurisdiction of the State of Texas, the equal protection of the law.

(*b.*) There was no evidence before the court, showing that the plaintiff at any time before or after the institution of the suit, or otherwise than by the mere fact of suit, made demand upon the defendant for the payment of the amount due under the policy sued upon.

(*c.*) There was no pleading or evidence before the court, showing that the plaintiff had paid any attorneys' fees, or become liable to pay any attorneys' fees; or if she had paid them or become liable to do so, to what amount.

For the reasons hereinbefore assigned, the defendant prays that the judgment rendered in said cause by the circuit court of the United States for the northern district of Texas be reversed by the Supreme Court of the United States.

MAURICE E. LOCKE,
Attorney for Defendant.

The foregoing has the following endorsement, to wit:

=163. Lula T. Lewis *vs.* Iowa Life Insurance Company. Defendant's assignment of errors. Filed 15 day of Feb. 1901. J. H. Finks, clerk by J. B. Finks, deputy.

59 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, sitting at Fort Worth, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Iowa Life Insurance Company, plaintiff in error, and Lula T. Lewis, defendant in error, a manifest error hath happened, to the great damage of the said Iowa Life Insurance Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the 17th day of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct

that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 15th day of February, in the year of our Lord one thousand nine hundred one.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth. }

J. H. FINKS,
Clerk of the Circuit Court of the United States for the Northern District of Texas.
By J. B. FINKS, *Deputy.*

Allowed February 15, 1901.

EDWARD R. MEEK,
United States District Judge for the Northern District of Texas.

60 Service of the within writ of error and receipt of a copy thereof are hereby acknowledged this the 15th day of February, 1901.

CAPPS & CANTEY,
Attorneys for Defendant in Error.

A copy of the within writ of error is this day lodged with the clerk for the use of the defendant in error.

J. H. FINKS, *Clerk*,
By J. B. FINKS, *Deputy.*

February 15, 1901.

61 [Endorsed:] # 163. Law. Lula T. Lewis *v.* Iowa Life Insurance Company. Writ of error. Filed 15 day of Feb., 1901. J. H. Finks, clerk. By J. B. Finks, deputy.

62 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lula T. Lewis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, to be held at the city of Washington, on the 17th day of March next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, sitting at Fort Worth, wherein Iowa Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States of America, this the 15th day of February, A. D. 1901.

EDWARD R. MEEK,
United States District Judge for the Northern District of Texas.

Attest with seal:

{The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth.}

J. H. FINKS,
Clerk of the Circuit Court of the United States for the Northern District of Texas,
By J. B. FINKS, *Deputy.*

63 THE UNITED STATES OF AMERICA, } ss:
Northern District of Texas, }

I hereby certify that I served the foregoing citation on Lula T. Lewis at Forth Worth, in Tarrant county, Texas, in the northern district of Texas, on the 23 day of Feb'y, 1901, by then and there delivering to said Lula T. Lewis, the defendant in error, personally, a true copy of said citation.

Witness my hand at Fort Worth, in the northern district of Texas, this the 23 day of Feb'y, 1901.

GEO. H. GREEN,
United States Marshall for the Northern District of Texas,
By WHIT DRYDEN, *Deputy.*

Fee	$2.00
Exp	.10
	$2.10

64 [Endorsed:] # 163, law. Lula T. Lewis *v.* Iowa Life Insurance Company. Citation in error. Marshal's docket No 571. Filed 26 day of Feb., 1901. J. H. Finks, clerk. By J. B. Finks, deputy.

65 *List of Papers for Transcript.*

Filed February 15th, 1901.

LULA T. LEWIS *vs.* IOWA LIFE INSURANCE CO. } No. 163. List of Papers for Transcript.

1. Transcript from State court.
2. Plaintiff's first amended original petition.
3. Defendant's third amended original answer.
4. Plaintiff's first supplemental petition.
5. Defendant's first supplemental answer.
6. Order overruling demurrers and exceptions.
7. Judgment.

8. Order extending time for filing defendant's bill of exceptions.
9. Defendant's bill of exceptions.
10. Defendant's motion for a new trial.
11. Order overruling defendant's motion for a new trial.
12. Defendant's petition for a writ of error.
13. Defendant's assignment of errors.
14. Order allowing a writ of error and fixing bond.
15. Defendant's bond on writ of error.
16. Original writ of error.
17. Original citation in error.
18. Clerk's certificate.

2, 15, '01.

MAURICE E. LOCKE.

The foregoing has the following endorsement, to wit:

#163. Law. Lula T. Lewis *vs.* Iowa Life Insurance Company. List of papers for transcript. Filed 15 day of Feb. 1901. J. H. Finks, clerk by J. B. Finks, deputy.

66 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States, in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors, and all proceedings in cause No. 163 wherein Lula T. Lewis is plaintiff and The Iowa Life Insurance Company is defendant, except that the original writ of error and original citation in error are included therein, instead of copies thereof, as fully as the same remains on file and of record in my office, at Fort Worth, Texas.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth.

Witness my hand officially, and the seal of the circuit court of the United States for the northern district of Texas, at Fort Worth, Texas, this the 27th day of February A. D. 1901.

J. H. FINKS,
Clerk of said Court,
By J. B. FINKS, *Deputy.*

Endorsed on cover: File No. 18,072. N. Texas C. C. U. S. Term No. 265. Iowa Life Insurance Company, plaintiff in error, *vs.* Lula T. Lewis. Filed March 6, 1901.

No. 265, 53

Br. of Locke for Pl. in Err.

Office Supreme Court U.S.
FILED
MAR 7 1902
JAMES H. McKENNEY
Clerk

Filed Mar. 7, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 265.

IOWA LIFE INSURANCE COMPANY,

PLAINTIFF IN ERROR,

v.

LULA T. LEWIS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

BY MAURICE E. LOCKE, DALLAS, TEXAS.

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Supreme Court of the United States.

Iowa Life Insurance Company, Plaintiff in Error, v. Lula T. Lewis.	18,072. October Term, 1901. No. 265.

Brief for Plaintiff in Error.

PRELIMINARY STATEMENT.

Lula T. Lewis brought this action against Iowa Life Insurance Company in the District Court of Tarrant County, Texas, whence the defendant removed it upon the ground of diverse citizenship to the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth (Tr., 8). The plaintiff sued in part (Tr., 13), and was allowed by the court (Tr., 39), to recover certain damages and attorney's fees by virtue of a statute of the State of Texas, which the defendant claimed by demurrer (Tr., 17) and exception (Tr., 39) to be in contravention of the constitution of the United States. Be-

cause of this constitutional question, the defendant has brought the entire cause directly to this court by writ of error under the provisions of Section 5 of the act of 1891 (Loeb v. Trustees of Columbia Township, 179 U. S. 472).

The purpose of the action was to recover the amount of a policy of insurance issued by the defendant upon the life of the plaintiff's husband, together with the statutory damages and attorney's fees. The questions involved in the main issue were two: whether the fact that the plaintiff had furnished the defendant no proofs of death barred her present action, and whether, before the death of the assured, the policy had become null by reason of the non-payment of a premium note. The court instructed the jury to return a verdict for the plaintiff, which it accordingly did.

ERRORS ASSIGNED.

1.

The court erred in overruling the defendant's first special exception to the plaintiff's first amended original petition, said exception constituting section 3 of the defendant's third amended original answer.

2.

The court erred in overruling the defendant's second special exception to the plaintiff's first amended original petition, said exception constituting section 4 of the defendant's third amended original answer.

3.

The court erred in refusing to permit the defendant to prove by the witness S. E. Starn, that before

the delivery of the policy sued upon, and the premium receipt which accompanied the same, the form of the contract of insurance which the insured was to receive was fully discussed between himself and said witness, and that it was agreed and understood that as a part of his contract of insurance the insured was to receive such a receipt as was delivered to him, all as shown by the defendant's exception No. 1.

4.

The court erred in refusing to give to the jury the defendant's requested special charge No. 1, in words as follows:

"You are instructed that under the undisputed evidence the plaintiff is not entitled to recover, and that therefore you should return a verdict for the defendant."

Said refusal is erroneous, because, under the undisputed evidence, the defendant was entitled to have a verdict directed in its favor.

5.

The court erred in charging the jury in words as follows:

"The first question to dispose of is as to whether or not the provision as to the payment of the note at maturity—it being provided on the back of the receipt for the note that the policy shall cease and determine if the note is not paid at maturity, is a provision of the contract entered into by and between the Iowa Life Insurance Company and Thomas M. Lewis; whether Lewis and his beneficiary are to be bound by that provision on the back of the receipt as a part of the policy of insurance.

"The question is not without its difficulties, but from the light which I have before me, and after lis-

tening to the argument of counsel, I am of the opinion that the provisions on the back of the receipt are not a part of the contract; that the contract, by its own explicit terms, is wholly included in the policy—the life insurance proper and in the application for such life insurance policy, which, by the terms of the policy is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement between the parties as to the provision upon the back of the receipt. Such provision is nowhere noted in the face of the contract of insurance; it is nowhere noted in the application for insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere.

"Even if this provision were considered a part of the contract entered into between the parties, yet it is such a provision, as to be taken advantage of would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity, the company should have within a reasonable time thereafter, notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that

any such action was taken on the part of the insurance company. It has been held by authority of weight and respectability, that this would be the necessary steps for the insurance company to take, were the provision which is contained on the back of this receipt contained in the face of the note given by the insured to the company in part payment of the premium. I can understand why the insured should be bound by provisions incorporated in the face of his note, because that note bears his signature, and in so far as it bears his signature it must be his act, and therefore, he himself has agreed to the provision. He signs his own note understandingly and wittingly. Even in that case, however, as I have stated the law as it has been held by courts of weight and authority, is that the company must notify the insured of the non-payment of the note, and that the policy, because of such non-payment has ceased and determined, and that they will no longer be liable thereunder.

"Therefore, on the first branch of this case, or rather the first question, the court has reached the conclusion that the fact that the assured did not upon the maturity of the note pay it, does not lapse the policy, and that it was in effect thereafter. It seems to me that the attitude of the company itself bears out this conclusion, because it being the possessor of the note with knowledge of the date of its maturity, placed it in the hands of a local bank for collection and permitted it to remain there after the date of its maturity, with the bank making its usual and customary efforts to collect the same. This was done with the tacit consent of its agent, Mr. Starns, to whom the note was sent for collection. This note, as has also been said by counsel, is of the highest

negotiable character and needed only the solvency of the individual whose name was appended thereto, to make it as good as currency."

Said charge was erroneous for each of the following reasons, to-wit:

(*a*) In law the provision for forfeiture contained upon the back of the receipt given to the insured for his premium was a part of the contract between himself and the defendant, and binding upon the plaintiff.

(*b*) The provision for forfeiture upon the back of the premium receipt given to the insured was a part of the contract, and by its terms entitled the defendant to have the policy considered forfeited by virtue of the non-payment of the premium note at its maturity, without affirmative action on the defendant's part.

(*c*) It appears from the undisputed evidence that the premium note represented a little less than half of the amount of the first annual premium, and that at the maturity of the note a little more than half of the first policy year had expired; wherefore, the note had been fully earned and the defendant was entitled to keep it and collect it, and at the same time enforce forfeiture for its non-payment at maturity.

6.

The court erred in charging the jury in words as follows:

"There is a provision in the face of the contract of insurance that satisfactory proof of the fact and cause of the death of the insured must be received and accepted at the company's office in Chicago, Ills.,

under certain conditions and within the terms of the policy, before its liability will attach.

"I have narrated in a somewhat desultory manner, the evidence as to furnishing proof of loss, and it seems to me that under the terms of the contract of insurance, the company is made the judge of what shall be satisfactory proofs of death. The company says that upon receipt of satisfactory proof of the fact and cause of death, its liability will attach, in event it is liable under other conditions of the policy. It must determine for itself what it will accept as satisfactory proof. Therefore, it best knows what its regulations are as to proof of death. The attitude of the company in this respect (and I am not referring to the attitude of its agent, Mr. Starns, in Ft. Worth), but of the secretary and general counsel of the company, who unquestionably acted as its full representatives and agents; their attitude on the matter of proof of loss is such as to here in this case estop the company from setting up the absence of this proof of loss as a defense—setting up that proofs of loss have not been furnished, and that therefore their liability does not attach. When they are called upon to say whether or not they deny liability under this policy, and if not, to permit the representatives of the deceased to make proofs of loss, they practically refuse to furnish blanks for that purpose, and the general counsel says there is no such policy in effect on the books of the company. Construing the statements of their letters in a fair way, they are tantamount, to my mind, to refusing liability on this policy and certainly one would feel it futile to go ahead thereafter and make proof of loss under the circumstances the beneficiary did, not knowing what the company would construe as satisfactory proof.

It seems to me as a question of law, that the insurance company should be estopped from here setting up that provision of the policy as a defense to this action."

Said charge was erroneous, because there was no evidence before the court proper to serve as a foundation for a verdict that the defendant had waived its right to require the furnishing of proofs of death, in accordance with the contract, or been estopped from enforcing such right.

7.

The court erred in charging the jury in words as follows:

"This being the view of the court, it will be your duty to return a verdict for the plaintiff for the face of the policy, which is three thousand dollars, and also interest thereon at the rate of six per cent. per annum from the first day of January, 1900 and also 12 per cent. penalty on the three thousand dollars—not on three thousand dollars and six per cent. added thereto, but 12 per cent. penalty on three thousand dollars. Also for reasonable attorneys' fees for the prosecution of this suit, basing your judgment, of course, on the evidence which has been introduced on that point.

"This, therefore, leaves the jury but one question to determine, this the fixing of reasonable attorneys' fees for the prosecution of this suit."

Said charge was erroneous for each of the following reasons, to-wit:

(*a*) Article 3071 of the Revised Statutes of Texas, which alone purports to require from the defendant the payment of damages and attorneys' fees, is in contravention of the fourteenth amendment to

the constitution of the United States, in that it denies to the defendant, which is a person within the jurisdiction of the State of Texas, the equal protection of the law.

(*b*) There was no evidence before the court, showing that the plaintiff at any time before or after the institution of the suit, or otherwise than by the mere fact of suit, made demand upon the defendant for the payment of the amount due under the policy sued upon.

(*c*) There was no pleading or evidence before the court, showing that the plaintiff had paid any attorneys' fees, or become liable to pay any attorneys' fees; or if she had paid them or become liable to do so, to what amount.

FIRST PROPOSITION,

BASED ON THE SIXTH ERROR ASSIGNED.

The court erred in ruling that the plaintiff could maintain her action, notwithstanding the fact that no proofs of death had been furnished the defendant.

STATEMENT.

The court charged the jury that the defendant was estopped from setting up as a defense the fact that no proofs of death had been furnished it; and the defendant duly excepted to the charge (Tr., 38-39).

The defendant's promise was to pay the sum insured within sixty days after receipt and acceptance, at its office in Chicago, of satisfactory proofs of the fact and cause of the death of the assured, within the terms of the policy (Tr., 24). No proofs of death were received by the defendant prior to the institution of the suit, and there was neither pleading nor proof

that any ever had been furnished; but the plaintiff relied upon a waiver thereof (Tr., 24 and 12-13).

S. E. Starn was the defendant's soliciting agent at Fort Worth, where the plaintiff and her husband resided. The application for the policy sued on was made through him. A few days after the death of the assured, which occurred October 7, 1899, representatives of the plaintiff requested Mr. Starn to furnish them blanks upon which to make proofs of death. He refused to do so; and as his reason for such refusal, he stated that he did not consider Mr. Lewis insured in the defendant company, as his policy was lapsed. The defendant had blank forms which it required claimants to use in making proofs of death, and which it furnished upon request for that purpose (Tr., 24).

Mr. Starn was an agent of the defendant company, but was not its president or secretary. His authority to act for it was granted and limited by a written contract and printed rules and instructions (Tr., 32-33). Both he and the secretary of the company testified that he had no authority other than that so prescribed; and the secretary testified especially that no duties ever had been imposed, or any authority conferred, upon Mr. Starn with relation to demanding or waiving proofs of death, or with reference to deciding whether the defendant was or was not liable to pay any specified policy of insurance (Tr., 33 and 34). There was no testimony to the contrary of this. The provisions of the contract and rules are fully set forth on pages 32 to 34 of the transcript. Neither document made it Mr. Starn's duty or privilege to represent the defendant in any matter pertaining to death claims or proofs of death. At the lower left-hand corner of the application for

the policy sued upon appear the following words, all being a portion of the printed blank, except the name of the subscribing agent:

"This risk is approved and recommended by

.....

Soliciting Agent.

[Signed] S. E. Starn,

General Agent."

A copy of the application, including said words, was attached to the policy. S. E. Starn's letter of March 5, 1899, to the defendant company, transmitting the application of Dr. Lewis for the policy, was written on a letter-head of the company, upon which the following words had been printed in red ink.

"S. E. Starn, dist. manager,
615 Grove Street,
Ft. Worth, Texas."

It was not shown that this letter-head or any similar one ever had been seen by the insured or the plaintiff (Tr., 35). The plaintiff did not plead that Mr. Starn was held out by the defendant as having authority to act for it in this matter, but pleaded that he had actual authority to do so (Tr., 12). The policy contains the following provision: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company" (Tr., 31-32).

On January 4, 1900, Mess. Capps & Cantey, who were then and thereafter the attorneys of the plaintiff, wrote to the defendant a letter reading as follows:

Letter-head of Capps & Cantey.

"Fort Worth, Texas, January 4th, 1900.

Iowa Life Insurance Co., Chicago, Ills.

Gentlemen: Concerning your policy No. 30140 issued to Thos. M. Lewis for $3,000, registered March 4th, 1899, with Lula T. Lewis, Mr. Starns has stated to us that the company does not recognize any liability under the policy by reason of the death of Thos. M. Lewis and has refused to furnish proofs of the death. We take it, of course, that this is the stand which the company has taken in the matter and that he does so through advices from you, though we are of the opinion that it is perhaps due to Mr. Starnes and you as well that we confer direct with the home office, and have the declination to recognize the liability or furnish proofs of death proceed from that source. We have been retained to sue on the policy and will appreciate it if you will by return mail advise us of what stand you have taken in the matter. Thanking you in advance for prompt attention, we are, Yours truly,

[Signed] Capps & Cantey."

To this letter the defendant, through its secretary, R. E. Sackett, replied on January 15, 1900, by a letter reading as follows:

Letter-head of Iowa Life Insurance Co.

"Chicago, Jan. 15th, 1900.

Messrs. Capps & Cantey, Fort Worth, Texas.

Gentlemen: We beg to acknowledge receipt of your favor of 4th inst., the same being in relation to a certain insurance policy issued by this company upon the life of one Thomas M. Lewis and numbered 30140.

In reply we beg to inform you that this is a matter which should properly have the attention of our

general counsel, and as he has been ill for some days, and is just now leaving the city for a trip of a week or ten days, we shall have to defer making further reply to your communication until his return.

Very truly yours,

[Signed] R. E. Sackett, Secretary.

P."

On January 27, 1900, this action was brought in the District Court of Tarrant County, Texas.

On January 31, 1900, the defendant, through E. L. Barber, its general counsel, made further reply to Capps & Cantey's letter of January 4th, by a letter reading as follows:

Letter-head of Iowa Life Insurance Co.

"Jan. 31st, 1900.

Messrs. Capps & Cantey, Fort Worth, Texas.

Gentlemen: Your letter of January 4th to the Iowa Life Insurance Company before me, and to which I respond simply as a matter of courtesy.

How any one could imagine that Mr. Starnes would have anything to do with furnishing or refusing to furnish proofs of death of anybody under any circumstances, connected with this company, I do not understand. I would state that it does not appear by the books of the company that Thomas M. Lewis was a policy-holder in said company at the time of his alleged death. We are neither called upon to deny or admit any liability by reason of the fact that he may at some time have been a policy-holder in this company, that I am aware of. If you or any other person desires blank forms of this company upon which proofs of death are usually made, we will furnish you them with the utmost pleasure, not for the purpose of furnishing proofs of the death of Thomas M. Lewis nor any other person, but sim-

ply as a matter of courtesy, and you will have the right to make such use of them as you desire. This, we never refuse to any person and we expressly state that in furnishing such blanks, we neither admit or deny any liability of any supposed or alleged claim in the hands of the parties asking for such blanks.

Yours, &c.,

[Signed] E. L. Barber,
General Counsel."

No blanks for proofs of death were sent to Capps & Cantey by the defendant with either of its letters above copied or at any time (Tr.,24-26). The plaintiff did not plead the letter from E. L. Barber above copied (Tr., 12-13).

ARGUMENT.

It was rightly assumed by the trial court and the litigants that the defendant was under no obligation to pay the sum assured until after it had received, or had waived, the proofs of death stipulated for in the policy; and that as none had been furnished, the plaintiff's action must fail unless she could show a waiver thereof.

Worsley v. Wood, 6 Term Rep. 710; O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169; Bryant v. Commonwealth Ins. Co., 6 Pickering 131; Scottish Union & Nat. Ins. Co. v. Clancey, 83 Texas 113; McCormack v. North British Ins. Co., 78 Cal. 468.

But the court was mistaken in supposing that it was for the company to determine what should be accepted as satisfactory proofs, and that consequently it would be futile for the plaintiff to make proofs without knowing the company's requirements. The contract required "satisfactory proofs of the fact and

cause of death, within the terms of this policy." The company had no right of arbitrary decision. It was bound to accept as satisfactory any proof which was reasonably sufficient, any proof which ought to be satisfactory.

> Bunyon on Life Assurance, 490; 2 May on Insurance, §465.

Mr. Starn, when asked for blank forms on which to make proofs of death, refused to furnish them; and as his reason for such refusal he "stated that he did not consider Mr. Lewis insured in the defendant company, as his policy was lapsed" (Tr., 24). Such a refusal and statement, if made by the company, would be a sufficient waiver of proofs of death. But this was not the company's act. In the first place, the language used by Mr. Starn shows that he merely expressed his individual opinion, and did not undertake to act for the company in denying its liability. In the second place, Mr. Starn had no power to waive the proofs of death.

A principal is concluded by the acts of his agent under two states of fact, and no others. (1) He is so concluded when either expressly or impliedly he has authorized the agent to do those acts. (2) He is so concluded when he has clothed the agent with apparent authority to do those acts, and when the party seeking to hold him responsible, himself acting in good faith and with reasonable prudence, has so dealt with the agent in reliance upon such apparent authority that it would be unjust to him to permit the principal to deny that the authority was real.

The record contains no appreciable evidence that Mr. Starn's apparent authority in this matter in any way exceeded his actual authority. But if the fact were otherwise, it could have no significance here.

It is through estoppel that a principal is bound by the apparently authorized acts of his agent. Such an estoppel is available only when all its necessary elements are pleaded and proven. Apparent authority can not be shown under an allegation of actual authority; and it would not be sufficient if it were shown.

> Rail v. City Nat. Bank, 3 Tex. Civ. App. 557; Mutual Ben. Life Ins. Co. v. Collin Co. Nat. Bank, 17 Tex. Civ. App. 477.

The question then is, whether Mr. Starn had actual authority from the company to refuse proof-blanks and deny liability in its behalf. It is entirely clear that no such authority had been expressly conferred upon him, and almost equally so that none had been conferred by implication. His office was to solicit applications for life insurance and collect the first year's premiums thereon, and, subject to the company's approval, to appoint other agents having like duties. The printed instructions also authorized him to collect renewal premiums when receipts therefor were sent him, signed by the president or secretary. His compensation was a large commission on the premium of the initial year, and a small commission on the renewal premiums of the next ten years, for all business procured personally or through agents appointed by him. His contract forbade him to make, alter or discharge any contracts, or waive forfeitures, grant permits, or bind the company in any manner not therein expressly authorized; and the printed instructions contained a similar clause. The purpose of his agency was the procurement of new business and the collection of premiums. Evidently it was not essential to the due accomplishment of that purpose that he should be empowered to pass

upon the company's liability for death claims. The two functions are wholly distinct; they require for their performance different kinds of ability; and they are not necessarily or naturally associated. It has frequently been held that the soliciting agent of an insurance company has no implied authority to waive proofs of loss.

> Lohnes v. Insurance Co. of North America, 121 Mass. 439; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531; Kirkman v. Farmers' Ins. Co., 90 Iowa 457; Knudson v. Hekla Fire Ins. Co., 75 Wis. 43; Smith v. Niagara Fire Ins. Co., 60 Vt. 682; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433.

Moreover, the policy contains the following provision, which is binding until shown to have been waived by the company: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company."

> Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326; Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234; Cleaver v. Traders' Ins. Co., 65 Mich. 527; Franklin Life Ins. Co. v. Sefton, 53 Ind. 380; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67; Porter v. United States Life Ins. Co., 160 Mass. 183; Marvin v. Universal Life Ins. Co., 85 N. Y. 278; Catoir v. Am. Life Ins. & Tr. Co., 33 N. J. Law 487.

The next question is, whether there can be found in the correspondence between the plaintiff's attorneys and the defendant either an independent waiver

of the proofs of death or a ratification of Mr. Starn's act. The letter by which the attorneys began the correspondence (ante, 12) was a peculiar one. Its opening statement that Mr. Starn said the company did not recognize any liability under the policy is not borne out by the record. The only conversation on the subject of which there is any evidence, is one in which Mr. Starn gave merely his own opinion (Tr., 24). The letter clearly shows that its writers did not at that time rely upon Mr. Starn's action as binding the company, and that they wanted something which would be binding upon it. Perhaps it would be hypercritical not to assume that by proofs of death they meant blank forms for proofs of death. But even so, the court will observe that they did not ask for such forms. They said they had already been retained to sue on the policy; and any lawyer experienced in insurance litigation would much rather have a waiver of proofs of death than blank forms upon which to make such proofs. Accordingly, the only thing they asked was that the company inform them by return mail what stand it had taken in the matter,—that is to say, whether it denied liability. At that stage of the proceedings, it was not the company's duty even to determine upon its course, much less to communicate its determination to the plaintiff. Eleven days after the attorneys' letter was written, the company's secretary replied to it (ante, 12-13) by saying that the matter was one which should properly have the attention of the general counsel, and that as the latter had been ill for some days and was then just leaving the city for a trip of a week or ten days, further reply would have to be deferred until his return. Manifestly the secretary was right in saying that the matter was one which

should have the attention of the company's counsel. The letter came from lawyers who said they had been retained to sue, and was in its nature a veritable trap. If in response the company should deny liability, it would thereby waive proofs of death, and if it should ask for proofs of death it would thereby waive all known defenses; a true case of Scylla and Charybdis. The secretary did absolutely nothing but give a valid excuse for the company's delay in replying; and it is not claimed that the excuse was untrue in point of fact. Surely there was here neither an independent waiver of proofs of death nor a ratification of what Mr. Starn had done. Twelve days later, with no intervening change in the situation, suit was brought for the amount of the policy and about seven hundred dollars of statutory penalties; and there was an apologetic averment that the plaintiff could not afford to wait the time indicated in the secretary's letter because of the nearness of the February term of the court (Tr., 5). Judicial notice will be taken of the fact that there are two district courts in Tarrant County, with terms beginning on the second Mondays of April and May, respectively (Tex. Rev. Stat., Art. 22, Secs. 17 and 48). The plaintiff could bring her suit at either of these terms, unless perchance the company should decline to waive its contract rights. In that event, it would have sixty days in which to investigate the merits of the claim after receiving proofs of death.

In pursuance of the secretary's promise, when the general counsel returned he made full reply to the letter of the plaintiff's attorneys (ante, 13-14). His letter was written in Chicago, the next day after the citation in this action had been served upon the defendant's agent in Texas. Apart from any con-

sideration of its contents, there are two reasons why this letter cannot support the plaintiff's theory of waiver. It was not written until after the suit was instituted, and it was not pleaded. But if it had been received before the filing of the petition and had been duly pleaded, what is there in it that tends to make out a waiver? It first denies, not directly but in language as strong as a direct denial, that Mr. Starn had anything to do with the matter of proofs of death. This is not a ratification of his action. It next states as a fact that it does not appear from the books of the company that Mr. Lewis was a policy-holder at the time of his death. This is not a denial of liability. The company's books might show a premium past due and unpaid, when in fact its collecting agent had received and embezzled the money. They might show a premium past due and unpaid, when in fact an agent by whose acts it was bound had without its knowledge extended the time for its payment; and it is just this, together with a tender of the money within the period of grace, which the plaintiff undertook to show in the present case. The books might show a premium past due and unpaid, and yet a serious question of law might exist as to the effect of that circumstance upon the company's liability; and so, as we shall see hereafter, it was in this case. The letter next declines either to admit or to deny liability. This is a position which the company had a right to take (2 May on Insurance §471), and which is by no means equivalent to a denial. Lastly, the letter says that blank forms for proofs of death will be furnished if desired. But they were not sent, because they had not been asked for.

In the case of Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326, it was said that "The doctrine

of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions." The elements of estoppel are notably absent in the present case; and the defendant ought not to be held to have waived its very important right to consider the question of its liability in the light of such information as proofs of death usually afford.

SECOND PROPOSITION,

BASED ON THE FIFTH ERROR ASSIGNED.

The following clause, printed on the back of the receipt given for the first premium, is a part of the contract sued upon, to-wit: "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

STATEMENT.

The trial judge instructed the jury that said clause was not a part of the contract, and the defendant took due exception to that ruling (Tr., 36-37).

The first sentence of the policy, appearing on its face, reads as follows: "The Iowa Life Insurance Company, in consideration of the stipulations and agreements in the application herefor (a copy of which is hereto attached), and of the provisions and requirements upon the next page of this policy, all of which are a part of this contract; and in consid-

eration, also, of the payment of seventy-four dollars and sixty-one cents, being the premium hereon for the first year, hereby promises to pay the sum of three thousand dollars, to Lula T. Lewis (wife of the insured) if living if not living, to the insured's executors, administrators or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis, of Fort Worth, County of Tarrant, State of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March, A. D. 1900" (Tr., 26).

Upon the second page of the policy is a provision as follows, it being one of those referred to in the sentence above quoted: "This policy is a contract made and to be performed in accordance with the laws of the State of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said State, and shall not go into effect until the premium hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon payment of the premium there shall be delivered a receipt signed by the president or secretary, and countersigned by an authorized agent" (Tr., 26-27).

The policy sued upon is of the kind designated by the defendant as a "ten-year convertible term stock" policy. It is dated March 13, 1899. The annual premium is $74.61. The policy was issued in

pursuance of a written and printed application therefor made by the insured under date of March 4, 1899. Said application requested the issuance of a "ten-year convertible term stock" policy, and stated that the premium of $74.61 was to be paid annually. It concluded with a recital as follows: "A note for premium of $74.61 has been paid under this application, to make the insurance binding from the date hereof, on condition that if the risk is not assumed by the company this sum is to be returned, in accordance with the receipt given as voucher for said payment" (Tr., 27).

On March 4, 1899, the insured executed and delivered to S. E. Starn, as agent of the defendant, in partial settlement of his premium, his note reading as follows:

"$37.30. March 4th, 1899.

Six months after date I promise to pay to the order of myself thirty-seven 30-100 dollars, at Ft. Worth, Texas, value received, with interest at 6 per cent. per annum.

T. M. Lewis, M. D."

He endorsed the note in blank as follows: "T. M. Lewis, M. D." (Tr., 27).

On March 5, 1899, S. E. Starn transmitted to the defendant the insured's said application and note with a letter, which in so far as it is material to this matter, reads as follows: "I herewith hand you application of Thomas M. Lewis for $3,000.00, 10-year term con. stock. Also his note to cover settlement." These papers were received by the defendant March 8, 1899, at its office in Chicago (Tr., 27).

The defendant accepted the application March 13, 1899; but did not signify to Thomas M. Lewis its acceptance thereof in any way other than by mak-

ing out and forwarding to its agent, S. E. Starn, for delivery, the policy sued upon, and the premium receipt hereinafter mentioned, which it did March 16, 1899 (Tr., 27).

On March 18, 1899, S. E. Starn countersigned the premium receipt, and delivered it and the policy sued upon to the insured, who received them both at the same time (Tr.,27-28).

The face of the premium receipt reads as follows:

"Iowa Life Insurance Company.

Chicago Office.

Received $74.61, being the first annual premium due March 4, 1899, under policy No. 30140 on the life of Thomas M. Lewis subject to the terms of the contract and the conditions on the back hereof.

Read the notice to policy-holders on the back of this receipt.

This receipt is not binding unless it is countersigned by S. E. Starn, Ag't, Ft. Worth, Tex.

[Signed] C. E. Mabie, President.

Countersigned this 18th day of March, 1899.

S. E. Starn."

The back of said premium receipt reads as follows:

"For terms of mutual agreement, see application and policy.

Notice to Policy Holders.

This receipt, to be valid, must be signed by the president or secretary of the company, and in exchange therefor, cash or its equivalent, be given by the holder of the policy, on or before date payment is due and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

If note be given for the payment of the premium

hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" (Tr.,28).

The policy sued upon is in the form always used by the defendant in making contracts of insurance of the kind designated by it "ten-year convertible term stock" contracts. At the time of issuing said policy it was the defendant's universal practice to issue with its policies premium receipts in form like the one delivered to the insured in this case (Tr., 28-29).

For the first annual premium, the insured gave the above described note for $37.30 and agreed to perform professional services for S. E. Starn to the value of the remaining $37.31. Starn was to furnish professional work to be done by Dr. Lewis in the examination of applicants for insurance and otherwise, and Dr. Lewis was to do it and let Starn have the fees. No work ever was done and no money ever was paid to S. E. Starn or the defendant in pursuance of this verbal agreement. Except that the note was given and the verbal agreement made, as just above stated, the defendant never received, and the insured never paid, anything upon account of the premium for the policy sued upon. S. E. Starn testified that before the issuance of the policy he reported to the defendant his agreement with Dr. Lewis concerning the payment of the premium (Tr., 28.)

ARGUMENT.

The application for the policy and the note for a portion of the premium bear the same date, and were delivered to the company at the same time. The application refers to the note, though by a wrong description. The policy is of the kind applied for, and refers to the application as being a part of the

contract. The policy does not itself constitute a receipt for the first premium, but provides that a separate receipt, executed in a specified way, shall be given therefor. The receipt, so executed, was delivered to the assured with the policy; and both policy and receipt were accepted and retained by him, and sued on by the beneficiary (See her original petition, Tr., 4). The receipt refers to, and is expressly qualified by, the conditions printed on its back, one of which is the clause under discussion. All these papers relate to the same transaction, each evidencing a distinct and necessary part thereof; and if any one of them were eliminated, it would be manifest from an inspection of the others that the record of the agreement was incomplete. From these facts it results that they all should be equally considered as parts of the written contract.

> Bailey v. H. & St. J. R. Co., 17 Wallace 96; Laughlin v. Fidelity Mut. Life Assn., 8 Texas Civ. App. 448; Babbitt v. L. & L. & G. Ins. Co., 66 N. C. 70; Hunt v. Livermore, 5 Pickering 395; Makepeace v. Harvard College, 10 Pickering 298.

The consideration for the granting and periodical renewal of the insurance was an annual premium of $74.91. The policy itself provided that it should not go into effect until the first premium, or a semi-annual or quarterly installment thereof, should be actually paid, and that a receipt should be given for such payment. The company could insist upon these terms, and refuse to contract upon any other, or it could waive them. If it chose to waive them it could do so unconditionally, or upon such conditions as it saw fit to impose. It did agree to waive actual payment in advance, but not unconditionally. Its

agreement for waiver is found only in the receipt. By the receipt it accepted the note and verbal promise in payment of the first premium, but did so subject to the express condition that if the note were not paid at maturity the policy should cease and determine. If this condition be erased, the company will be held to a contract which certainly never had its conscious assent.

It does not appear to have been the theory of either the trial court or the plaintiff that the contract of insurance became complete at any time before the delivery of the policy and receipt. But if it should be argued here that the meeting of minds took place when the company accepted the application, and if the court should be of that opinion, the result would not be changed. The application did not undertake to express completely the terms of the contract; it only described by name the kind of contract desired. Therefore, when the company accepted the application it did so subject to all the terms and conditions usually embraced in its contracts of that kind, of which the clause under consideration was one.

Eames v. Home Ins. Co., 94 U. S. 621; Barre v. Council Bluffs Ins. Co., 76 Iowa 609; DeGrove v. Metropolitan Ins. Co., 61 N. Y. 594; Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549.

THIRD PROPOSITION,

BASED ON THE THIRD ERROR ASSIGNED.

The court erred in refusing to permit the defendant to prove that before the delivery of the policy and premium receipt, the form of contract which the assured was to receive was fully discussed between himself and the agent, and that it was agreed and

understood that as a part of his contract he was to receive such a receipt as was given him.

STATEMENT.

While the witness S. E. Starn was on the stand, counsel for the defendant asked him the following question: "When you took this application and delivered this policy, what conversation, if any, did you have with Dr. Lewis about the receipt that you gave him?" To this question counsel for the plaintiff objected, upon the ground that the matter inquired about was irrelevant and immaterial and could not affect the terms of the contract. The court announced that he thought the objection well taken. Thereupon counsel for the defendant offered to prove by the witness upon the stand that before the delivery of the policy and receipt, the form of contract which Dr. Lewis was to receive was fully discussed between the witness and Dr. Lewis, and it was agreed and understood that as a part of his contract of insurance he should receive a receipt in the form of the premium receipt that was delivered to him, and which appears in evidence. The court refused the offer, and sustained the objection to the question; to which ruling of the court the defendant then and there duly took exception. This statement is a copy of the defendant's first exception (Tr., 35-36).

ARGUMENT.

The purpose of the evidence proposed was not to vary the written contract by parol testimony, but to show more clearly than had already been done that he receipt was a part of the written contract. If the language of the papers and the circumstances of their delivery left any doubt as to whether this was so, the

defendant could have removed that doubt by the testimony offered; and it should have been permitted to do so.

Bailey v. H. & St. J. R. Co., 17 Wallace 96, pp. 105 and 108; Cornell v. Todd, 2 Denio 130, p. 133.

FOURTH PROPOSITION.

BASED ON THE FIFTH ERROR ASSIGNED.

Under the terms of the contract, the insurance ceased immediately upon the non-payment of the premium note at maturity, without necessity of affirmative action of any kind upon the part of the company.

STATEMENT.

The clause under consideration reads as follows: "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" (Tr., 28). The court charged the jury that, assuming this clause to be a part of the contract, yet it was "such a provision as to be taken advantage of would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity the company should have within a reasonable time thereafter notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined." To this charge the defendant excepted upon the ground stated in the proposition (Tr.,37). The premium note given by Dr. Lewis fell due about a month before his death, and was not paid. No affirmative action was shown

to have been taken by the company relative to such default, except that it instructed its agent not to accept payment of the note (Tr., 30).

ARGUMENT.

If this clause forms a part of the contract, it must be given its due effect. The circumstance that it is found in the premium receipt rather than in the note, application or policy cannot nullify it or change its operation. It may be suggested, however, that its insertion in the note would have been less fair to the assured than its insertion in the receipt, which he was to hold, and which he could examine at any time. The language of the stipulation is plain, and needs no construction. Its legitimate result was to cause the insurance to cease immediately upon default in the payment of the note.

Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252; Laughlin v. Fidelity Mut. Life Assn., 8 Texas Civ. App. 448, writ of error refused by the supreme court, 93 Texas 733; Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; McIntyre v. Michigan State Ins. Co., 52 Mich. 188; Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389; Manhattan Life Ins. Co. v. Pentecost, Ky., 49 S. W. Rep. 425; Banholzer v. New York Life Ins. Co., 74 Minn. 387.

FIFTH PROPOSITION,

BASED ON THE FIFTH ERROR ASSIGNED.

The company had the right to collect the past-due premium note, without thereby waiving the forfeiture consequent upon its non-payment at maturity.

STATEMENT.

The contrary of the above proposition seemed to be assumed by the trial judge in his charge to the jury, and due exception was taken accordingly (Tr., 37-38). The insurance year began March 4, 1899, and the annual premium was $74.61 (Tr., 26 and 27). The premium note for $37.30 was dated March 4, 1899, and became due six months and three days thereafter (Tr., 27). For the remaining $37.31 of the annual premium, the assured gave his verbal promise to render professional services upon the request of the company's agent. No money ever was paid, and no services ever were rendered, upon account of this promise; nor was any effort ever made to secure such payment or rendition of services (Tr., 28 and 29). Default was made in the payment of the note; and there is some evidence in the record to show that when it was about three weeks past-due the company's agent agreed to accept payment of it. Upon this issue the testimony is conflicting (Tr., 29).

ARGUMENT.

The note was for a little less than half the annual premium, and when it matured a little more than half the policy year had expired. Therefore its amount had been fully earned before the default occurred. Nothing ever was paid, and no attempt ever was made to collect anything, on account of the verbal agreement. If forfeiture of the policy would have the effect of releasing the assured from the payment of the unearned portion of his premium, it would constitute a perfect defense against any subsequent demand for the fulfillment of that agreement. If it would not have such effect, then a fortiori it would not discharge his obligation to pay the earned premium.

and the company could rightfully enforce the forfeiture and still collect on both the note and the oral promise. If the company, while insisting upon the forfeiture, might lawfully collect the earned premium, and the amount thereof was sufficient to cover either the note or the oral promise, it could elect which it would proceed upon. It follows that the existence of the oral agreement in no way diminished the rights which accrued to the company upon the maturity and dishonor of the note.

When a policy becomes forfeit by reason of some breach of condition upon the part of the assured, the insurer can collect the earned portion of the premium without thereby waiving the forfeiture. If it were not so, the assured could at his own pleasure avoid paying for insurance already enjoyed, by violating the contract in a way too serious for the insurer to overlook. In other words, by committing a wrong he could relieve himself from the performance of a duty. In this connection no distinction is perceived between a forfeiture consequent upon non-payment of a premium note at maturity, and a forfeiture resulting from any other breach of condition.

Union Cent. Life Ins. Co. v. Wilkes, 92 Texas 468; Laughlin v. Fidelity Mut. Life Assn., 8 Texas Civ. App. 448; Union Cent. Life Ins. Co. v. Chowning, 8 Texas Civ. App. 455; Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; Moreland v. Union Cent. Life Ins. Co., Ky., 46 S. W. Rep. 516; Park v. Hilton, Ky., 54 S. W. Rep. 949; Wall v. Home Ins. Co., 36 N. Y. 157; Smith v. Saratoga Co. Mut. Fire Ins. Co., 3 Hill 508; Shultz v. Hawkeye Ins. Co., 42 Iowa 239; Williams v. Albany City Ins. Co., 19 Mich. 451; Limerick v. Gorham, 37 Kansas 739; Smith v.

Continental Ins. Co., 6 Dak. 432; Matthews v. American Ins. Co., 40 Ohio St. 135; Farmers' Mut. Ins. Co. v. Hull, 77 Md. 498.

Of course if the actual collection of the note after default would not waive the forfeiture, an offer by the company's agent to accept payment would not do so. This is a matter which may be of great and possibly controlling importance upon a second trial. Therefore the court is respectfully asked to pass upon it, in case it shall reverse the judgment for some other reason.

SIXTH PROPOSITION,

BASED ON THE FIRST AND SEVENTH ERRORS ASSIGNED.

Article 3071 of the Revised Statutes of Texas denies to the defendant, which is a person within the jurisdiction of the State, the equal protection of the laws guaranteed to it by the Constitution of the United States, and therefore is not binding upon the defendant.

STATEMENT.

The defendant demurred (Tr., 17), upon the ground of the above proposition, to so much of the plaintiff's petition (Tr., 13) as sought to recover statutory damages and attorney's fees. The court overruled the demurrer, and the defendant duly excepted (Tr., 21). The court instructed the jury to include in its verdict against the defendant reasonable attorney's fees and a penalty of twelve per cent. of $3000, the amount of the policy. To this charge the defendant took due exception for the reason stated in the proposition (Tr., 39). The judgment against the defendant includes the sum of $360 as damages

and $500 as attorney's fees (Tr., 22). The plaintiff alleged that the defendant was a corporation organized under the laws of the State of Iowa, doing business as a life insurance company in Texas, and maintaining an office and agency in Tarrant County, Texas (Tr., 11). No issue was made under these allegations, which were confessedly true (R. S., 1265; Tr., 17, 8 and 32). In this action the defendant was sued and served in Texas, and there appeared in obedience to the citation (Tr., 1, 7 and 8). The defendant was not shown, and did not claim, to be within any of the classes exempted from the operation of Article 3071.

ARGUMENT.

The statute under consideration reads as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The circuit court of appeals for the fifth circuit has recently held that this article has no application to accident insurance companies; because their business is neither life insurance nor health insurance, but is something distinct from them both and so recognized by the legislature.

Fidelity Casualty Co. v. Dorough, 107 Fed. Rep. 389.

By other statutes, subsequently enacted, two

general classes of life insurance corporations are exempted from the provisions of Article 3071, to-wit: "mutual benefit organizations doing business in this state through lodges or councils," and "mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other state, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said associations in accordance with their several by-laws and regulations."

R. S., 3092 and 3096; Sup. Council Am. Legion of Honor v. Larmour, 81 Texas 71; Mut. Res. Fund Life Assn. v. Payne, 32 S. W. Rep. 1063.

The state and federal courts in Texas and the circuit court of appeals at New Orleans have repeatedly held that Article 3071 is valid, or that at least it is obligatory upon foreign insurance companies doing business in the state. In the present discussion inquiry will therefore be made, first as to whether the statute is valid upon its own merits, and then as to whether if not so it is nevertheless binding upon foreign corporations.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant distinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; Magoun v. Ill. Tr. & Sav. Bank, 170 U. S. 283; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

It cannot be doubted that the equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress" (Mr. Justice Bradley in Missouri v. Lewis, 101 U. S. 22). Our first inquiry must therefore be answered in the negative, unless there is some real distinction between the obligation of a life or health insurance company to pay its "loss" and the obligation of persons and corporations generally to pay their debts. Furthermore, it must be answered in the negative unless in some way the duty to pay their respective "losses" rests differently upon life and health insurance companies which are without the two excepted classes, and upon accident insurance companies, individual underwriters, and life and health insurance companies within the excepted classes.

The "loss" of a life or health insurance company is nothing but a debt, and its failure to pay the same is merely a breach of contract. This is not within the scope of the police power of the states as commonly understood, or a proper subject for classification.

> G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31.

But if it were otherwise, it would be very difficult to point out a satisfactory reason why the duty to pay a life or health insurance claim was more imperative than the duty to pay other debts. The supreme court of Texas never has attempted to do so, though the question has been before it several times. In its first and leading case of Union Cent. Life Ins. Co. v. Chowning, 86 Texas 654, that court rested its

decision upon the right of the states to classify persons, and said nothing about the merits of this particular classification. In Fidelity and Casualty Co. v. Allibone, 90 Texas 660, the court merely stated that the question was distinguishable from that involved in the Ellis case. Upon every other occasion, it has been content to deny a writ of error without delivering an opinion, or, without discussing this question, to render a judgment including the penalties. The courts of civil appeals have usually treated the question as closed for them by the decisions of the supreme court. Hence it is that the three below mentioned are the only cases in which any court has attempted to justify the discriminations of the statute.

> New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Orlopp, 61 S. W. Rep. 336.

In the Smith case, the majority held, in an able opinion based upon the decision of this court in the Ellis case, that the statute was invalid; and in a dissenting opinion the first effort was made to defend the classification. The argument there put forth is that the law is a legitimate exercise of the police power; that whenever the legislature finds a business carried on by corporations to be detrimental to the interests of the people, it may discriminate against that business and deal with it in any manner that wisdom or caprice may suggest; and that "the policy of the state seems to be to hamper, discourage, embarrass, and retard" what is known as the old-line life insurance business. The dissenting justice found sufficient reason for this policy in the fact that certain companies had accumulated very large assets, and in

the course of about fifteen years of business in Texas had collected there some twenty million dollars of premiums and paid only about five and a half million dollars of losses; and that the receipts and disbursements of other companies were in like ratio. I cannot bring myself to believe that such an argument requires serious refutation in this court.

In the Yoakum case, the circuit court of appeals attributes to the legislature a wholly different purpose in the enactment of this law. It mentions and illustrates the fact that Texas has no statute requiring that warranties shall be construed as mere representations, and none forbidding physicians to testify about disclosures made to them in their professional capacity. It speaks of the length and cost of some litigations, and of the inequality between the position of a skillfully managed corporation and that of an unlettered peasant. From such a line of reasoning the court deduces the conclusion that "the obvious purpose is to secure a righteous degree of care in writing policies of insurance," and that the classification involved "is therefore not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies." But the legislature did not declare such a purpose, and the law is not an appropriate means of accomplishing it. Certainly it has no bearing on the question of whether communications to physicians shall be privileged, and no tendency to make less stubborn a litigation once begun. It does not equalize the business ability of the corporation and the peasant; but rather it stimulates the search of corporation counsel for defenses that can be relied upon to defeat unjust claims, regardless of their relation or lack of relation to the actual grounds for declining payment. The fact that Texas has not fol-

lowed the example of other states in enacting laws of the character indicated, shows that it is not her policy to so curtail the freedom of contract and of judicial investigation. The law cannot properly be vindicated as tending very remotely to accomplish a purpose which the state repudiates. It is worthy of note, too, that the circuit court of appeals appears to have changed its opinion as to the purpose of the law. In Fidelity and Casualty Co. v. Dorough, 107 Fed. Rep. 389, it says: "There is little doubt that the statute in question imposing penalties upon life and health insurance companies which are so combative as to contend for their supposed rights under written contracts containing resolutory and suspensive conditions, and based on warranties, in the courts of the state of Texas, when the right to so contest is denied to no other class of suitors, is penal in its character."

The decision of the court in the Orlopp case was announced by the same justice who had a few years before dissented in the Smith case, and added nothing of importance to the literature of the subject. But the remarkable fact that in the face of numerous adjudications by the appellate courts of the state to the contrary, the district judge in that case ruled that the law was unconstitutional, and placed "an unreasonable and unconscionable penalty on an insurance company for daring to avail itself of the privilege of litigating its rights," shows how deep-rooted is the feeling of the bench and bar that those adjudications are wrong.

In the opinion of the majority in the Smith case the object of the statute was said to be "to compel such insurance companies to pay their debts for a death claim within the time provided by the policy;"

and in the Walden case (26 S. W. Rep. 1012) its object was said to be "to prevent vexatious delays in the payment of death losses." Aside from the fact that these statements omit all reference to health and endowment insurance, they are manifestly correct; and upon them the law ought to stand or fall. The legislature did not stop to speculate as to whether insurance companies would exercise more care in writing their policies if the courthouse doors were shut against them.

The attempt has been made (British Am. Assur. Co. v. Bradford, 60 Kansas 82) to sustain similar legislation upon the ground that the business of insurance is one clothed with a public interest, and so subject to public regulation. Doubtless it may be subjected to special rules as to those aspects wherein it touches the policy of the state in some way peculiar to itself. The state may always prohibit the making of contracts injurious to the public interests. So, valued policy laws may be justified as tending to prevent reckless insurance with its attendant evils; and standard policy laws, because they make insurance contracts more nearly uniform and certain, and prevent the insertion in them of provisions dangerous to the commonweal. Laws directing that copies of the applications be attached to the policies, laws providing that immaterial breaches of warranty shall not annul the insurance, laws requiring that notice be given of accruing premiums,—all these deal with features of the insurance business that are peculiar to it, and relative to which it may well be specially classed and specially regulated. But in the obligation to perform their contracts and pay their debts, insurance companies do not differ from other natural or artificial persons, and therefore in this regard they

ought not to be classed by themselves. When a lawful contract has been made, the public has no interest in it other than that it shall be fulfilled by both parties; and the courts should be equally open to them both for the double purpose of ascertaining their respective liabilities and enforcing the discharge thereof.

The state of Nebraska has a statute, almost verbatim the same as that of Kansas, allowing attorney's fees, to be taxed as costs, in judgments rendered against insurance companies upon policies of fire, tornado or lightning insurance on real property. The supreme court of Nebraska, in considering that law, said in substance that fire insurance companies were notoriously litigious and prone to contest claims upon frivolous pretexts; and that therefore such legislation was justifiable (Lancashire Ins. Co. v. Bush, 60 Neb. 116). Occasionally one hears a like argument urged in support of the Texas statute. But, in the first place, this argument rests upon a false premise. Life insurance companies have probably less litigation in proportion to the volume of their transactions than any other business institutions. And the percentage of such litigation in which the exempted accident and assessment companies figure is unreasonably large. During the years 1883 to 1899 inclusive, the three leading life insurance companies transacted in Texas a business of over $246,000,000. Volumes 60 to 93 of the reports of the supreme court of Texas show that during the same seventeen years these companies had in that court seven suits relating to losses, in five of which their position was sustained. Volumes 110 to 178 of the reports of this court show that during the same period they had thirteen cases here, in eleven of which their conten-

tions were approved by the court. I do not know to what incomprehensible figures their totals mounted in the meantime; but at the end of 1899 they had outstanding more than a million policies aggregating more than three billion dollars. In the second place, the statute imposes its penalties indiscriminately upon all the companies therein described, without any regard to their individual character for contentiousness or to the nature of their conduct in particular suits pending. Thus companies ordinarily very compliant are punished for resisting in the best of faith what they suppose to be wrongful demands upon their treasuries. Nor are all litigious people so dealt with, but only a few arbitrarily selected. It is as if the legislature had commanded that all red-headed men (to whom tradition ascribes more than their due share of combativeness) should pay damages and attorney's fees when defeated in their law suits. If litigiousness were a proper basis for classification, all plaintiffs and defendants manifesting such a disposition should be included, and no others. But litigiousness is not a proper basis for classification. It is the boast of all free governments that within their domains the rights of the citizen are secure. He who contends in court for his supposed rights does no wrong; but often he renders to society its highest service at an infinite sacrifice of his own convenience. Submissiveness was not the spirit that animated the Boston tea party, or the Lexington farmers who "fired the shot heard round the world." When it becomes the prevailing spirit, we shall have reached that point in our national history "where wealth accumulates and men decay."

It might be supposed that the law was intended to compel the payment of death claims without liti-

gation, because the evidence of the assured would not be available in their support. But it covers sick-benefits and endowments as well as death losses. The plaintiff in a life insurance case always has a great advantage over the defendant because of his more intimate knowledge of the personal history of the assured; and no legislation is needed in this behalf. Moreover, no penalty is imposed upon those who litigate other causes of action with representatives of deceased persons. The law cannot be sustained as devised for the protection of widows and orphans; because it inures to the benefit of administrators, assignees, creditors, and all other holders of death, sick-benefit and endowment claims. If it were argued that life and health insurance policies were intended to provide cash assets for times of emergency, the sufficient answer would be that policies of fire, marine, storm, and accident insurance partake equally of this character, while bank deposits have it to a much greater degree. Yet all these may be contested without any penalty.

It is the duty of every person to pay his rightful debts; but it is not the duty of any one to pay an unjust claim made upon him. On the contrary, as Prof. von Ihering has well demonstrated in his book on The Struggle for Law, we all owe to the community the obligation of resisting such demands. This court decided a few years ago upon high grounds of public morals, that a life insurance company could not even by an express promise bind itself to pay a man's personal representatives a policy matured by his deliberate suicide (Ritter v. Mutual Life Ins. Co., 169 U. S. 139). Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date (Bunyon on Life Assurance, 115).

Fraud and self-destruction would be wofully multiplied by such encouragement. Yet this partial and unequal statute goes very far toward driving all life and health insurance companies away from the courts, and making their policies virtually incontestable. For no matter how fully convinced a company may be that a claim made upon it is wrongful, it dares not refuse payment unless it has in hand evidence sufficient to force a verdict from jurymen whom the law tells that it is an unworthy suitor.

In this connection the language of Mr. Justice Brewer, arguendo, in the recent case of Cotting v. Godard, 183 U. S. 79, is very significant. "Do the laws," he asks, "secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought. Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that

every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws?——— Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his right is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws."

The parties to such a contest do not enter it upon equal terms. A sum ranging anywhere from twenty-two per cent. to thirty-five per cent. of the amount in controversy is given to the plaintiff as a prize and exacted from the defendant as a penalty, if the plaintiff wins; but if the defendant wins it gets no prize, and the plaintiff pays no penalty.

In the Ellis case, the question was whether a statute allowing to the plaintiff an attorney's fee of $10 was valid. The court held that it was not, but three justices dissented upon the ground that attorney's fees might be allowed as costs. The law now under consideration gives to the plaintiff not only an attorney's fee in such sum as the jury may fix ($500 in this case), but also twelve per cent. of the policy as punitory damages, all in addition to six per cent. interest and the costs of the court.

But even if it were possible to distinguish life and health insurance losses from other debts, surely

there exists no legitimate ground for the discrimination which this statute makes among those who sustain such losses.

In the first place, the operation of the law is confined to corporations; individual insurers are not affected by it. Individual life underwriting is of course now unusual; but it is neither impossible nor unprecedented. In the early days of the business, life policies were commonly, if not exclusively, subscribed by one or more individuals, after the manner of the marine underwriters at Lloyd's (Bensa, Il Contratto di Assicurazione nel Medio Evo, 228, 232; Wittingham v. Thornborough, 2 Vernon 206; Lord v. Dall, 12 Mass. 115). The debts being of the same character, why is the duty of a corporation to pay any more imperative than that of an individual.

In the second place, "mutual benefit organizations doing business in this state through lodges or councils" are exempt from these penalties. The court can take judicial notice of the generally understood fact that there are but few stock companies engaged in writing life insurance in this country. Of the seven largest American companies, only one has any capital stock, the other six being mutual. These companies are "mutual benefit organizations." The purpose of their existence is to obtain for their members the benefits of life insurance at actual cost, and not to earn profits for shareholders. The only difference between them and those exempted is that they do not transact their business through lodges or councils. What conceivable relevancy has this distinction to the matter of debt-paying? They are alike in the circumstance that they are corporations issuing life insurance policies and charging premiums therefor. They are competitors in business. Yet in

contesting doubtful claims, one risks only the ordinary costs and expenses of litigation, while the other hazards in addition to them the heavy penalties named in this law. Nor does there appear to be any more reason for a distinction in this matter between mutual companies and those which have capital stock.

In the third place, "mutual relief associations—— which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members," are exempt. The only distinction between these associations and other mutual life insurance companies, is that they get their funds from after-death assessments while the others get theirs from advance premiums. This difference may well affect the question as to what is a reasonable time after the death of the assured within which to make the claim mature; but it can not have any proper bearing upon the duty of the respective corporations to pay their debts when they become due.

In the fourth place, according to the decision of the circuit court of appeals, accident insurance companies are not included in either class of corporations named in the statute, and therefore are exempt from its penalties. What possible basis can there be for such a discrimination? Suppose a case in which this defendant and an accident insurance company have policies of $10,000 each upon the same life. The circumstances attending the death of the assured show that it was either suicidal or accidental. Both companies are convinced that it was suicidal, and both refuse payment and defend upon that ground alone. The two cases are consolidated and tried as one. The jury adopts the theory of accident. Upon its verdict are based two judgments, one against the accident insurance company for $10,000 and interest

and costs, and the other against this defendant for $10,000 and interest and costs, and in addition thereto $1,200 damages and $1,000 or $1,500 attorney's fees. Is not such a result in the highest degree unreasonable and unjust?

It has sometimes been suggested that the legislature meant to impose the penalties upon corporations organized for purposes of profit, and to exempt those of benevolent aim. But this could not have been the legislative intent, even if such a difference would warrant the classification. As above mentioned, it is known of all men that most of the old-line life insurance business of America is done by mutual companies not organized for profit; yet these are subjected to the penalties. It is perhaps equally well known that in this country nearly all the accident insurance is underwritten by stock companies created for the profit of their shareholders; yet these are exempt from the penalties.

The authorities were so thoroughly considered by this court in the Ellis and Matthews cases that any general review of them here would be out of place. The later decisions of the courts have contributed little to the discussion. With only a few exceptions they have been founded upon the Ellis case, not merely in recognition of its binding force but with hearty approval of its reasoning. So far as I have observed, no court has yet had occasion to adopt the distinction drawn by Mr. Justice Brewer in the Matthews case. It could have been, but was not, applied to the facts of Paddock v. Mo. Pac. Ry. Co., 155 Mo. 524. In that case, the supreme court of Missouri held unconstitutional a statute allowing attorney's fees to plaintiffs in actions to recover damages for injuries to stock occurring in consequence of

the failure of a railway company to fence its track as required by law. But this distinction has no bearing upon the present controversy, which is governed by the general principles announced in the Ellis case and reiterated in the Matthews case. The supreme court of Colorado, in Davidson v. Jennings, 60 Pac. Rep. 354, and a little earlier the supreme court of Alabama, in Randolph v. Builders' & Painters' Supply Co., 106 Ala. 501, held unconstitutional statutes allowing attorney's fees to the successful plaintiffs in suits to enforce mechanic's liens. In Johnson v. Goodyear Min. Co., 127 Cal. 4, the supreme court of California held invalid a statute giving to employes of corporations liens and attorney's fees in suits to enforce the same.

Article 8012 of the Revised Statutes of Missouri (of 1899) reads as follows: "In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent on the amount of the loss, and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict." The court will notice that this statute is less objectionable than the one now under examination. It applies to all kinds of insurance companies, and allows the penalties only in case of their vexatious refusal to pay. Yet it has been held unconstitutional in Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31. The opinion of Judge Phillips is interesting and cogent, especially that part of it, covering several pages, in which he refutes the proposition that the enforce-

ment of insurance contracts may come within the police power. Quoting from State v. Greer, 78 Mo. 188, he says that the police power is a system of precaution " 'for the prevention of crimes or of calamities,' and police regulations 'are such provisions of the law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens, and to secure them in the enjoyment of their property. And the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such condition, as would be detrimental to the community, and on no other grounds.' " He adds that "The business of insurance is not immoral. It spreads no contagious disease. It does not affect the public health. It does not affect the public policy of the state, nor threaten the community with any public calamity or danger."

Section 2140 of the Georgia Civil Code provides that if any insurance company refuse to pay a loss within sixty days after demand, it shall be liable, in addition to the loss, for not more than twenty-five per cent. of its amount and all reasonable attorney's fees; provided it shall be made to appear that the company's refusal of payment was made in bad faith. This statute, like that of Missouri and radically unlike that of Texas, makes no discrimination among insurance companies of different kinds, and punishes them only when they are found to have acted in bad faith. But the supreme court of Georgia, in a recent decision, quoting from numerous authorities and citing the Ellis case as conclusive, held it to be violative of the equal protection clause of the Fourteenth Amendment (Phenix Ins. Co. v. Hart, 112 Ga. 765).

From the foregoing considerations it seems clear

to me that the Texas statute denies the equal protection of the laws to life and health insurance companies not exempted from its provisions; and of such is the defendant.

2.

Our second inquiry is whether, if the statute be violative of the Constitution, it is nevertheless binding upon foreign corporations as a condition of their right to do business in Texas. It has been so held in some cases.

> Mutual Life Ins. Co. v. Walden, 26 S. W. Rep. 1012; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; contra, the majority opinion.

The argument is, that Texas had power to condition in whatever way she chose the defendant's right to transact business within her territory; that the statute was enacted before the policy was issued; and that, therefore, by entering the state and issuing the policy the defendant agreed to be bound by the statute.

The defendant is a life insurance corporation domiciled in Iowa, and had no inherent right to do business in Texas. The latter state could exclude it, or could admit it upon conditions; and for the present it will be assumed that her power to impose express conditions was unlimited.

Article 745 of the Revised Statutes as amended by chapter 119 of the General Laws of 1897 provides a method whereby a foreign corporation may obtain a permit to do business in Texas, and that "such corporation on obtaining such permit shall have and enjoy all the rights and privileges conferred by the

laws of this state on corporations organized under the laws of this state." In S. A. & A. P. Ry. Co. v. S. W. Tel. &. Tel. Co., 93 Texas 313, p. 322, the supreme court says of this provision: "Thus the state adopts the foreign corporation upon the terms stated in the law and makes it equal to domestic corporations." While this article does not apply directly to the admission of foreign insurance companies, it shows what is the general policy of the state in dealing with non-resident corporations admitted within its limits.

Article 3071 itself does not distinguish between foreign corporations and those of domestic origin. They stand upon exactly the same plane. As originally enacted (Sec. 9, Ch. 145, General Laws of 1874), it applied only to life insurance companies incorporated elsewhere than in Texas. It was changed to its present form in 1879, becoming Article 2953 of the Revised Statutes of that year; and thus it was made applicable to health insurance companies as well as life, and to domestic corporations as well as foreign.

The terms prescribed for the admission of life and health insurance companies doing business otherwise than upon the assessment plan are found in Articles 3062-3069 of the Revised Statutes. The payment of damages and attorney's fees to persons obtaining judgments against them is not one of the conditions there specified. Article 3071, requiring such payment, is simply a part of the general statutes; and it has no force as a condition binding upon the defendant other than such as it derives from that fact. It is one of twenty articles, 3070-3089, relating to general features of the insurance business. To illustrate, 3070 is a venue law; 3072 provides for the

revocation of the license of any life or health company which fails to satisfy an execution against it within thirty days; 3073 prohibits the issuance of life policies by companies engaged in fire, marine, or other insurance business; 3075 limits the amount which fire, marine and inland insurance companies may expose to loss in single risks; 3076 limits their right to own real estate; 3077-3081 provide a remedy for the impairment of the capital of domestic companies; 3083-3085 require annual statements; 3087-3088 regulate the payment of dividends; and 3089 is a valued policy law. Most of these articles relate to all companies doing business in Texas, without reference to their domicile.

By Articles 3048-3049 it is made the duty of the insurance commissioner to issue a certificate authorizing any insurance company to do business in Texas, when satisfied that it has complied with the law and that it has the requisite financial strength. The company is not required to make any promise about paying attorney's fees and damages; and obviously it would have no occasion either to pay them or to become liable for their payment until after it had been admitted to the state and begun to transact business.

Nor have the Texas courts bound this court by an interpretation of the article as one of the terms of admission of foreign companies to the state. The supreme court never has held it to be so, having placed its decisions upon the ground that the law is valid. The court of civil appeals for the second district held in the Walden case by a bald assumption without reasons given, that Article 3071 was found among the prescribed conditions upon which life insurance companies might do business in Texas, and that a foreign corporation was not in position to com-

plain of these requirements. Afterwards, in the Smith case, that court discussed and overruled the Walden case, and held that the article was not one of the conditions upon which foreign corporations were admitted, and that it was like any other statute, ——binding if valid. Probably the Orlopp case (61 S. W. Rep. 336) should be construed as a return by that court to its original doctrine. All the other courts of civil appeals have simply followed the decisions of the supreme court that the law is valid. The five courts of civil appeals in Texas are intermediate courts, whose rulings and interpretations are not authoritative.

Of course foreign corporations entering Texas for the transaction of business thereby subject themselves to her laws. But to draw from this familiar doctrine the conclusion that Article 3071 is binding upon them is a sheer begging of the question. If the article is unconstitutional, it is not law; but is only a fruitless attempt of the legislature to do something which was beyond its power. Suppose that when the defendant entered Texas there had been upon the statute rolls, or in the state constitution, some other article, of superior authority and entirely inconsistent with Article 3071; would any one say that it was bound by 3071, and not at liberty to point out in court the inconsistency of the two? In the words of Chief Justice Taney, "The Constitution of the United States, and every article and clause in it, is a part of the law of every state in the Union, and is the paramount law." (Prigg v. Pennsylvania, 16 Peters 539, p. 628). The Fourteenth Amendment is a part of the law of Texas; and the defendant is claiming here only the right to show that it is inconsistent with Article 3071.

So far as my observation has extended, never, except in these Texas cases, has it been suggested that a corporation left behind it the protection of the Constitution when it crossed the borders of the state of its origin. At the suit of a New York corporation, the supreme court of Georgia held unconstitutional a statute resembling that now under consideration; and the circuit court in Missouri did the like for an English corporation. The Kansas and Nebraska decisions hereinbefore referred to as sustaining similar legislation do not rest upon any such ground, though the corporations involved were British. In both the leading cases wherein the Texas supreme court declared the law to be valid upon its own merits, the litigating companies were foreign. This court has not hesitated, whenever the facts required it, to step across the path of states seeking to deprive foreign corporations of their property without due process of law, or of their right to remove causes to the federal courts.

C., M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418; St. L. &. S. F. Ry. Co. v. Gill, 156 U. S. 649; Smyth v. Ames, 169 U. S. 466; Home Ins. Co. v. Morse, 20 Wallace 445; Barron v. Burnside, 121 U. S. 186.

The equal protection clause of the Fourteenth Amendment, by its plain terms, extends to all persons who are within the jurisdiction of the state, and not to those only whose homes are there. That corporations are persons within the meaning of this clause has long been settled.

The case of Fire Assn. of Philadelphia v. New York, 119 U. S. 110, lends no support to the doctrine that foreign corporations are bound by all the statutes of a state without regard to their constitution-

ality. The logic of that case seems to me to be this. The Fire Association was a Pennsylvania corporation, which first entered New York in 1872. At that time there was upon the statute books of New York a law requiring that all insurance companies of other states doing business in New York should pay to it the same tax (when higher than the regular New York rate) which New York insurance companies were required to pay in such states. In 1873 Pennsylvania enacted that every foreign insurance company should report each January the amount of premiums received by it in Pennsylvania during the preceding calendar year, and pay a tax of three per cent. thereon as a condition of its right to continue business in the state. The Pennsylvania tax rate of three per cent. therefore became engrafted upon the New York law in 1873. The Fire Association did business in New York by virtue of annual licenses. At the beginning of each fiscal year it occupied the position of a foreign corporation seeking admission to the state for that year. Each time the state met it at the threshold with the proposition that it would be admitted upon condition that it pay into the state treasury three per cent. of its premiums collected in New York, a condition to which there is no constitutional objection. It seems to have accepted the proposition from year to year, and to have paid its tax accordingly. But in 1882 it refused to pay the tax on the premiums of 1881, and to collect this tax the action was brought. When it applied for and accepted its license to do business in New York for the year 1881 (or perhaps 1882), it impliedly agreed to pay the tax; and the court held that it should do so. There was here no room for the operation of the Fourteenth Amendment. It was a lawful contract

between the state and the company. The state said to the company, which was then as to this particular matter a person without its jurisdiction, that in consideration of the payment of a certain sum of money, it would admit the company within its boundaries for one year; and the company accepted the offer. The present case is very different. Here the court is asked to decide that when the defendant has been admitted to the state, and under its license has transacted business with its citizens, and controversies have grown out of such transactions, the state may deny to the defendant the equal protection of the laws in the settlement of those controversies.

The case at bar is wholly unlike that of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28. When the Oil Company entered Texas, the state had a law forbidding certain combinations in restraint of trade, and providing that foreign corporations violating the same should be prohibited and enjoined from doing business there. Obviously this made abstinence from such combinations an express condition of the right of the Oil Company to transact business in Texas; and the suit was brought to enjoin it from continuing business, on the ground that the condition had been violated. The court held that no question of discriminations was presented by such a record. The situation was somewhat analogous to that found in Doyle v. Continental Ins. Co., 94 U. S. 535. There it was held that although the state of Wisconsin could not prevent a foreign corporation from removing causes to the federal courts, it could lawfully revoke the license of one which had done so.

This case is likewise plainly distinguishable from that of New York Life Ins. Co. v. Cravens, 178 U. S. 389. There it appeared that the legislature of Mis-

souri had enacted that no life insurance policy upon which two annual premiums had been paid should be forfeited for non-payment of premiums; and that in case of lapse, such a policy should be commuted for paid-up insurance. The general validity of the statute was not questioned. The Insurance Company's contention was, that as this was an interstate contract, the parties thereto could elect to be bound by the laws of either state; that they had chosen to contract under the laws of New York; and that the judgment of the supreme court of Missouri to the effect that they could not do this had deprived it of its freedom of contract without due process of law. In other words, the Insurance Company contended that because it was a foreign corporation, it could do business in Missouri and claim for such business an exemption from the valid laws of that state. The court held that such a claim was without foundation. But in the case at bar, the defendant admits that as to its Texas business it is bound by the laws of Texas; and it only claims the right to test in the appropriate tribunals the question as to whether a certain provision is really one of those laws.

So far in this argument it has been assumed that the state of Texas had unlimited power to name express conditions upon which alone the defendant should be admitted within its borders. But in fact it had not the power to impose conditions "repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Lafayette Ins. Co. v. French, 18 Howard 404;

Home Ins. Co. v. Morse, 20 Wallace 445; Barron v. Burnside, 121 U. S. 186; Blake v. McClung, 172 U. S. 239; Dayton Coal & Iron Co. v. Barton, 183 U. S. 23.

The controlling principle seems to be that when for reasons of public policy an important right is guaranteed to a person by the Constitution or laws of the United States, he can not either expressly or by implication bind himself to waive that right. His agreement to do so is invalid, because the interest of the nation forbids its enforcement. As was said by Mr. Justice Hunt in Home Ins. Co. v. Morse: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

Whatever force there is in the argument that the penalty statute was imposed by the state as a condition of the defendant's right of entry, is derived from the agreement to waive its constitutional guaranty of equal protection thought to be involved in its acceptance of the state's license. For if the effect of the statute is to deny the equal protection of the laws to the defendant while within the jurisdiction of the state, then, considered as a law, the statute is null and void; and it can act, if at all, only as evidence of the terms of an implied contract between the state and the defendant.

So important is the right of access to the courts, that one can not bind himself in advance by an agreement not to resist any suits of a particular kind which may be brought against him; or by an agreement to submit to arbitration whatever disputes may grow out of a transaction.

Home Ins. Co. v. Morse, 20 Wallace 445; Pope Mfg. Co. v. Gormully, 144 U. S. 224; Thompson v. Charnock, 8 Term Rep. 139; Rowe v. Williams, 97 Mass. 163; Del. & Hud. Canal Co. v. Pa. Coal Co., 50 N. Y. 250.

The right to the equal protection of the laws is one guaranteed by the Constitution of the United States; and the essence of that right is the privilege of appealing on equal terms to the courts for protection against unjust demands. It is a right vastly more important to the individual and to the public than that of removing causes from state tribunals to federal. All the reasons which have impelled this court to hold of no effect an express agreement to waive the privilege of removing causes, apply with double force to the proposition that an implied agreement to waive the right of equal protection is nugatory. In this connection I beg to quote from Mr. Justice Harlan's dissenting opinion in Fire Assn. of Philadelphia v. New York, 119 U. S. 110. The court thought his language inapplicable to the facts of that case, but to this discussion it appears exceedingly appropriate. "Can it be," he asks, "that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a state which has enacted a statute denying such protection to it and to like corporations from the same state? Is the right to that protection any less valuable or fundamental than the right to remove a suit into the courts of the Union for trial? Will it be held that an express agreement by a corporation not to exercise the latter right is void and not enforcible, but that a local statute denying the equal protection of the laws to a corporation will

be upheld, simply because that corporation came within the jurisdiction of the state which assumed to make such denial, and received from her officers, acting in conformity with her laws, a certificate of its right to transact business there? Will effect be given in one case to what (erroneously, I think) is called an implied agreement to surrender a constitutional right, while an express agreement in the other to surrender a constitutional right is held to be invalid?"

In the first part of this argument I endeavored to show that the statutory classification was arbitrary and unconstitutional. If it be so, the case appears to me to come fairly within the principle established in Home Ins. Co. v. Morse and Barron v. Burnside, and recognized at the present term in Dayton Coal & Iron Co. v. Barton, 183 U. S. 23, where Mr. Justice Shiras, delivering the opinion of the court, said: "We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state." In that event, the requirement of the statute would not have bound the defendant even if it had been made one of the express terms of admission. A fortiori, it does not bind as a general statute not made an express condition of the defendant's right to enter Texas.

Probably the defendant in error will rely upon the refusal of this court to grant a writ of certiorari in the case of United States Life Ins. Co. v. Ross, at the last term, as settling this constitutional question. The Ross case was one which could have been brought directly here; but the defendant com-

pany chose to try its chances in the circuit court of appeals. It was not entitled to have its case determined by both courts (Loeb v. Trustees of Columbia Twp., 179 U. S. 472). No written opinion having been delivered, it seems to me probable that the writ was refused for this reason, and not upon consideration of the merits of the questions involved.

SEVENTH PROPOSITION.

BASED ON THE FIRST AND SEVENTH ERRORS ASSIGNED.

Assuming Article 3071 of the Revised Statutes to be a valid law, still the defendant is not liable for the damages and attorney's fees thereby imposed, because no demand was made upon it for payment of the loss before the suit was begun.

STATEMENT.

The defendant demurred (Tr., 17) to so much of the plaintiff's petition (Tr., 13) as sought to recover the statutory damages and attorney's fees, upon the ground that it showed no demand for payment of the policy sued upon. The demurrer was overruled, and due exception was taken (Tr., 21). The court instructed the jury to include damages and attorney's fees in its verdict; and the defendant excepted to the charge because there was no evidence showing that the plaintiff at any time before or after the institution of the suit, or otherwise than by the mere fact of suit, made demand upon the defendant for the payment of the amount due under the policy sued upon (Tr., 39). The judgment as rendered includes $860 for damages and attorney's fees (Tr., 22). The plaintiff's petition did not allege any demand made for payment (Tr., 11-16). Except by the in-

stitution of this action, the plaintiff never at any time made demand upon the defendant for payment of the sum due her on account of the contract of insurance (Tr., 35). She had, however, made such requests for blank forms for proofs of death and received such responses to her requests, as are set forth in Section 2 of the bill of exceptions (Tr., 23-26), and stated under the first proposition of this brief (ante, 9-14).

ARGUMENT.

The statute reads as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The statute inflicts its penalties only in case the company liable for a loss "shall fail to pay the same within the time specified in the policy, after demand made therefor." No demand ever having been made in this case, the liability for the penalties never attached.

The theory upon which the trial judge based his ruling was that of waiver. He construed what took place relative to proofs of death as a denial of liability on the part of the defendant, and held that this would amount to a waiver of the demand required by the statute. I have endeavored to show in discussing the first proposition (ante, 9-21), that the defendant never denied liability prior to the filing of the

suit. If it did not, then of course it did not thereby waive the demand.

But if the court should be of opinion that there was such a denial of liability as would relieve the plaintiff from the necessity of furnishing proofs of death, still it is believed that the penalties were not incurred by the act. Huge waivers can be constructed out of very slender materials, but this one seems too great. Waiver is the voluntary relinquishment of a known right; and men are not quick to consent that heavy penalties be imposed upon them, or to waive the conditions precedent of such penalties. Courts ought therefore to be careful about implying an intention to do so from acts done with reference to entirely different matters. The statute is highly penal in its character; and it does not say that denial of liability shall bind the company to pay damages and attorney's fees. The elementary rule is that such a statute will not be extended beyond its letter, and that any one claiming under it must bring himself strictly within its terms (Sutherland on Statutory Construction, § 358).

This question has arisen before only in the case of Northwestern Life Assurance Co. v. Sturdevant, 59 S. W. Rep. 61. There the court of civil appeals for the fourth district held that the right to damages and attorney's fees did not accrue to the plaintiff without previous demand for payment, notwithstanding the defendant's denial of liability. In delivering the unanimous opinion of the court, Chief Justice James said: "This statute is penal in its nature, and the right to recover under it is strictly statutory, and the plaintiff did not bring herself strictly within its provisions. Schloss v. Railway Co., 85 Texas 603, 22 S. W. 1014. It does not appear that any demand

had been made on the company for payment before suit, the only demand being the suit itself. It is contended that this demand was unnecessary, because the defendant's attitude has, ever since the attempted forfeiture, been one of refusal, of repudiation of the policy, and denial of its liability. ——— But we think it matters not how vigorously the insurance company may have denied its liability or asserted its determination not to pay. This cannot be made to take the place of what this statute prescribes as essential to the accrual of those penalties. These acts do not constitute a failure to pay the loss after demand made therefor, when there has been no demand. If the legislature had intended that a suit on the policy was the demand provided for, and the defense of the suit constituted a failure to pay after demand, it was useless to provide for a demand and failure to pay in order to render the company liable for these items. It would have been sufficient to provide that defendant would be liable for them if payment was not made in a reasonable time after suit. We think it was the intention of the legislature to require a demand to be made after the policy became due, and before a suit."

CONCLUSION.

To recapitulate, the plaintiff in error contends that there is no right of recovery against it for any sum, because no proofs of death were furnished (first proposition), and because the policy had become void before the death of the insured (second, fourth and fifth propositions). It contends, moreover, that it is not liable for damages and attorney's fees, because the statute allowing them is unconstitutional (sixth proposition), and because, if valid, its conditions have

not been met (seventh proposition). For these reasons, and because of an error in rejecting testimony (third proposition), it prays that the judgment of the circuit court be reversed.

Respectfully submitted,

MAURICE E. LOCKE,

Counsel for Plaintiff in Error.

FILED
OCT 15 1902

No. 13,032.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 13.

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LULA T. LEWIS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Reply Brief for Plaintiff in Error.

By MR. FRED E. DOOLE,
Dallas, Texas.

IN THE

Supreme Court of the United States.

IOWA LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

LULA T. LEWIS.

18,072.
OCTOBER TERM, 1902.
No. 53.

Reply Brief for Plaintiff in Error.

FIRST PROPOSITION.

Mr. Starn's agency contract expressly limited his office to matters wholly foreign to death claims and proofs of death, and denied to him any authority to waive provisions of the insurance contract (Tr., 32 and 33).

The policy sued on contains a similar limitation upon the power of the agent (Tr., 31–32).

The signature of Mr. Starn to the application as "general agent," if not a mere clerical error, was his own declaration only, and not evidence of his authority. His contract and instructions, and all the testimony, show that he was not a general agent, but was a special agent of narrowly circumscribed functions.

Mr. Starn's letter head, on which he described himself as "Dist. Manager," was likewise only his own declaration.

Besides, it was not shown ever to have been seen by the plaintiff or the assured, or approved by the defendant.

There is no issue of apparent authority in the case, the plaintiff's allegation being one of actual authority.

The letter of the general counsel was written after this action had been begun and process had been served; and it was not pleaded by the plaintiff. Therefore it can form no part of her cause of action. She must stand upon her rights as they existed when she filed her suit.

To the list of authorities at the bottom of page 17 of my original brief, I beg to add a case recently decided by this court.

> Northern Assurance Co. *vs.* Grand View Bldg. Assn., 183 U. S. 308.

SECOND PROPOSITION.

No issue of fact was determined against the defendant in this matter. The court instructed the jury that the forfeiture clause on the back of the premium receipt was not a part of the contract.

The defendant waived the condition of the policy requiring that the premium be paid in cash, but did not waive it unconditionally. The premium receipt given by the defendant, accepted by the assured, and sued on by the plaintiff, was not regular and unconditional upon its face as stated by counsel in their brief. Upon its face it was expressly made "subject to the terms of the contract and the conditions on the back hereof." One of those conditions was:

> "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" (Tr., 28).

The reference to the application and policy for the terms of the mutual agreement of course related only to matters not then before the eye of the reader—to the general contract of

insurance, and not to the subsidiary contract whereby a note was substituted for the cash payment of premium required by the policy. It could mislead no one.

The premium receipt was not a volunteer paper, causelessly injected into the transaction by the defendant. The policy itself in terms provided for the giving of just such a receipt (Tr., 26–27).

THIRD PROPOSITION.

I ask leave to add the following cases to the list of authorities at the top of page 29 of my original brief:

Verzan *vs.* McGregor, 23 Cal. 339.
Heywood *vs.* Perrin, 10 Pickering 228.
Myers *vs.* Munson, 65 Iowa 423.

FOURTH PROPOSITION.

If the clause on the back of the receipt forms a part of the contract, then the contract contains a stipulation for forfeiture of the insurance upon non-payment of the premium note. Unquestionably the policy was in full force during the currency of the note; but when default was made in the payment of the note, the insurance ceased ipso facto. The situation then was, that the assured had enjoyed six months of insurance for which he had paid nothing except his dishonored note.

Counsel rely upon the case of Insurance Co. *vs.* French, 30 Ohio St. 240, as authority for the proposition that an affirmative forfeiture of the insurance was necessary. That case rested upon peculiar facts. An unconditional receipt had been given for the premium, and the company had been in the habit of extending the time for the payment of past due premiums on that policy. The very note for whose non-payment forfeiture was claimed represented in part the unpaid interest due on former notes. No such facts exist in the case at bar. Moreover, the French case was decided twenty-

six years ago and never has been generally accepted as authoritative. I believe it never has been cited by the supreme court of Ohio, and never by this court save once when it was distinguished. In so far as its language supports the broad proposition that an insurance contract which in terms provides for automatic forfeiture can be forfeited only by affirmative action, the French case stands alone, opposed by reason and by the overwhelming weight of authority.

FIFTH PROPOSITION.

To the authorities cited on pages 32 and 33 of the original brief, I beg to add a recent decision of the supreme court of Iowa; which holds upon satisfactory reasoning that when a policy is forfeited by the non-payment of a note representing the entire premium, the insurance company is yet entitled to collect the whole amount of the note, the unearned portion as well as the earned.

Economic Life Assn. *vs.* Spinney, 89 N. W. Rep. 1095.

SIXTH PROPOSITION.

The Supreme Court of Missouri has lately held unconstitutional the penalty statute of that State, which is quoted on page 49 of the original brief.

Thompson *vs.* Traders Ins. Co., 68 S. W. Rep. 889.

SEVENTH PROPOSITION.

The question whether demand was necessary to mature the right to the penalties arose upon demurrer (Tr., 17), as well as upon exceptions to the charge of the court. No demand was alleged by the plaintiff (Tr., 11–13), and none ever was made, except by the institution of this action (Tr., 35).

Respectfully submitted.

MAURICE E. LOCKE,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED
OCT 13 1902
JAMES H. McKENNEY.
Clerk

No. 53.

Iowa Life Ins. Co. v. Hamilton & Colbert for Def.

Filed Oct. 13, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 53

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LULU T. LEWIS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM CAPPS,
S. B. CANTEY,
For Defendant in Error.

LAW REPORTER PRINT, WASHINGTON, D. C.

Supreme Court of the United States.

No. 18,072.

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LULU T. LEWIS, DEFENDANT IN ERROR.

No. 265.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

A writ of error was prosecuted in this case directly from the United States Circuit Court for the Northern District of Texas, upon the contention that the statute of the State of Texas, authorizing the holder of a life or health insurance policy, to recover twelve per cent damages and reasonable attorney's fees, in the event of loss accruing under the same, was contrary to, and a violation of the provisions of the Constitution. This principal issue and ground of appeal being now practically eliminated by the recent decision of this court in the case of "The Fidelity Mutual Insurance Co. *vs.* Mettler," the Defendant in Error will be permitted to reply chiefly to the two questions suggested in the brief by Plaintiff in Error, as being involved in the "main issue."

First.

The court did not err in instructing the jury peremptorily that the defendant was estopped from setting up, as a de-

fense to the action, the failure on the part of the plaintiff to furnish it satisfactory proofs of loss, as required under the terms of the policy.

By the express terms of the contract between the defendant and S. E. Starn (which was in force during the time of the entire controversy, beginning with the application for the policy sued on, and ending at the time of the trial), said Starn was—

> "appointed its agent to solicit applications for life insurance throughout the State of Texas, and to collect the first year's premiums thereon; and with full power to appoint agents under the supervision of, and subject to the acceptance of said company, . . . (Rec., p. 32.) He signed the application which was sent to the defendant for its approval, as 'General Agent,' and his stationery, upon which his communications reached the defendant, described him in printed head lines as 'Dist. Manager'" (Rec. p. 35).

The agent Starn refused to furnish plaintiff any blank forms for making out the proofs under the policy, when requested so to do by plaintiff's agents, and claimed that he did not consider Mr. Lewis insured in the the company, as his policy had lapsed.

This action on the part of its agent, Starn, was faithfully reported to the secretary of the defendant company, and he was requested to advise the plaintiff's agents what stand the defendant had taken in the matter, and whether or not it desired to confirm the position of its agent. The secretary in turn referred the matter to the general counsel for the defendant, who in substance informed the plaintiff, that from the books of the company, it did not appear that Lewis was a policy-holder at the time of his alleged death (Rec., p. 25.)

The insurance contract contained a promise to pay three thousand dollars—

> "within sixty days after receipt and acceptance at the company's office in Chicago, Ill., of satisfactory proofs of the fact and cause of death. . . ."

Under this clause the company should determine for itself what it would accept as "satisfactory proofs," and a refusal to furnish blank forms, kept by it for that purpose, upon the ground that the policy had lapsed, was tantamount to a statement that the defendant was in no manner liable.

I. A denial of liability, or a denial of the existence of a contract by the insurer, is a waiver of the condition requiring proof of the loss or death.

Knickerbocker Life Insurance Co. *vs.* Pendleton, 112 U. S. 696.

May on Insurance, Secs. 469–473, 473A.

Insurance Co. *vs.* Lee, 73 Tex. 641.

Joyce on Insurance (Volume 4), Sec. 3380.

Second.

The contentions of the plaintiff in error from pages 21 to 33 of its brief, on the subject of a forfeiture of the policy sued on, arose mainly upon an issue of fact, which under undisputed evidence was resolved adversely to it.

The whole subject of its position must necessarily depend upon whether or not the recitals on the back of the premium receipt became a part of the contract.

The writings being in evidence, afford the most convincing and conclusive evidence of what portion of the same, or what recitals in the same should, or were intended by the parties to constitute the agreement between them.

The policy proper recited that its terms, together with the application, should constitute the contract. It contained a provision that—

> "this policy . . . shall not go into effect until the premiums hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the life time of the insured."

The agent, Starn, accepted the application of the insured,

T. M. Lewis, and forwarded the same to the defendant, together with a promissory note (in terms of the highest negotiable character), signed by the insured. The defendant by accepting this note, and issuing and delivering the policy, waived this provision in its own judgment, beyond the hope of all cavil or question. Neither the policy nor the application mention the subject of the contract becoming determined by reason of the failure to pay any note which might be given or accepted for the premium (Rec., pp. 26–7).

The negative of such a proposition is manifest from the condition expressly set out, to the effect that the policy shall not go into effect until the premium, or some quarterly or semi-annual installment shall have been actually paid.

The receipt, regular and unconditional on its face, contained a recital on its back, that if a note be given for the premium and be not paid at maturity, the policy shall cease and determine. Still, above this recital on the receipt, it is expressly stipulated as follows: "For terms of mutual agreement, see application and policy." (Rec., p. 28). All of the writings by positive certainty of stipulation oblige the parties, and announce the mutual meeting of the minds, only upon the stipulations contained in the policy proper, and the application, and not upon those of a receipt, the giving of which was wholly unnecessary, and agreed by the writings to be no part of the "mutual agreement."

1. Where the contract contains no stipulation for forfeiture upon the non-payment of a note, given for the premium, when due, payment is not a condition precedent to the validity of the contract; and the policy continues in force, notwithstanding such non-payment at maturity.

Joyce on Insurance, Secs. 1212–1211, citing:
93 Ind. 7; 101 Mass. 558; 45 N. J. 543; 42 Mich. 19; 69 N. Y. 286.
May on Insurance, Secs. 345–345 E.

For the payment of the premium in question, the defendant had accepted a note, which, in the language of the

court, needed only the solvency of the maker to render it as good as currency. In doing so it waived the only express condition relative to the time when the policy should become effective. The evident intention of the parties was to treat the note as a cash payment, and the policy as in full force; especially so in view of the fact that the receipt was given for $74.61, being the full amount of the annual premium, while the note was for only one-half that amount, and the insured under the agreement with the agent, Starn, was to pay the balance in professional services.

Sixty-five per cent of the note belonged to the agent, Starn, under his contract; after its maturity, the defendant and Starn, as owners of the same, made the ordinary efforts to collect the same through a local bank, and the agent tried to collect it in person (Rec. p. ——)

The defendant did not evidence any intention to declare the policy forfeited, even if it had the right to do so; and if it had this right it should have declared such intention by some prompt and unequivocal statement or action.

The Mutual Insurance Co. *vs.* French, 30 O. St. 240; 27 Am. Rep. 443.

Cited in Insurance Co. *vs.* Thompson, 104 U. S. 253.

Third.

The contention by plaintiff in error, wherein it challenges the validity of the statutes of Texas, awarding the right to recover twelve per cent damages and attorneys fees against accident and life insurance companies, has been settled by the late decisions in Insurance Co. *vs.* Mettler, ——, adversely to the propositions presented in the brief from pages 33 to 62.

Fourth.

The proposition with reference to formal demands for the amount of the policy, beginning with page 62 of the brief of plaintiff in error, is not in our judgment supported in law or in fact.

The Statute of Texas, Article 3071, does not provide or contemplate that demand shall be made for the damages and attorney's fees, but for the loss accruing under the policy, and the twelve per cent damages and attorneys' fees follow the recovery.

There is no affirmative declaration by the court in the record showing that it regarded this demand or necessity therefor as waived, or whether the court found that the acts of plaintiff's agents amounted to a demand sufficient to satisfy the terms of the law.

There is no peculiar or particular phraseology necessary to constitute a demand. The interview between the persons representing plaintiff and the agent, Starn, was a demand for the loss; and the letter from plaintiff's attorneys to the defendant company amounted to a demand. The preparation, after this correspondence, of a formal demand and presentation of the same, would have been idle and futile, and the observance of which the law does not require.

It is a familiar legal principle that the necessity of a formal demand is often waived or obviated by the contract of the other party, or where the state of the case is such as to show that the demand would have been entirely unavailing.

Heard v. Lodge, 37 Mass. 53.

Abels v. Glover, 15 La. An. (La.) 724.

Lazensky v. The Supreme Lodge, etc., 31 Fed. Rep. 592.

Insurance Company v. Winning, 58 Fed. Rep. 541.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

WILLIAM CAPPS,
S. B. CANTEY,
Counsel for Defendant in Error.

GEORGE E. HAMILTON,
M. J. COLBERT,
Of counsel.

Supreme Court of the United States.

No. 53.—October Term, 1902.

The Iowa Life Insurance Company, Plaintiff in Error, *vs.* Lula T. Lewis.	In error to the Circuit Court of the United States for the Northern District of Texas.

[December 8, 1902.]

This is an action upon a life insurance policy, and was originally brought in the District Court of Tarrant County, Texas, and removed by the defendant, plaintiff in error here, to the Circuit Court of the United States for the Northern District of Texas on the ground of diversity of citizenship.

The action was to recover $3,000, alleged to have become due upon a life insurance policy issued by plaintiff in error to Thomas M. Lewis, the husband of the defendant in error. The defendant in error also, under the laws of Texas, (art. 3071, Revised Statutes of Texas,) prayed judgment for interest on the said $3,000 from the date of the death of the said Thomas M. Lewis, together with a penalty of twelve per cent on the amount due, and for an attorney's fee of $750.

The case was tried to a jury and resulted in a verdict for the defendant in error for $3,000, the principal of the policy, with interest from January 1, 1900, $300 damages, and an attorney's fee of $500. Judgment was entered in accordance with the verdict.

The statute of the State of Texas, allowing interest and attorney fees, was attacked by plaintiff in error as being in contravention of the Constitution of the United States. The statute was sustained, and the case was brought here under section 5 of the Judiciary Act of 1891.

By the policy the plaintiff in error promised to pay defendant in error the sum of $3,000 upon the death of Thomas M. Lewis, if death should occur on or before the fourth day of March, 1900, and to pay the sum within sixty days after the receipt by plaintiff in error of satisfactory proofs of death and its cause. Lewis died on the seventh of October, 1899.

The issues in the case besides the constitutionality of the Texas statute are (1) whether the insurance company waived proof of death; (2) whether the policy had ceased and determined before the death of the insured by non-payment of the premium. The evidence bearing upon the issues is as follows:

"The first sentence of the policy sued upon, appearing upon the face thereof, reads as follows: 'The Iowa Life Insurance Company, in consideration of the stipulations and agreements in the application herefor (a copy of

which is hereto attached), and of the provisions and requirements upon the next page of this policy, all of which are a part of this contract; and in consideration, also, of the payment of seventy-four dollars and sixty-one cents, being the premium hereon for the first year, hereby promises to pay the sum of three thousand dollars to Lula T. Lewis (wife of the insured) if living; if not living, to the insured's executors, administrators or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis, of Fort Worth, county of Tarrant, State of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March, A. D. 1900.'

"Upon the second page of the policy is a provision reading as follows, it being one of the provisions referred to in the sentence above quoted from the face of the policy: 'This policy is a contract made and to be performed in accordance with the laws of the State of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said State, and shall not go into effect until the premium hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon payment of the premium there shall be delivered a receipt signed by the president or secretary, and countersigned by an authorized agent.'

"Another provision appearing upon the second page of the policy reads as follows: 'All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company.'

"The policy sued upon is of the kind designated by the defendant as a 'ten-year convertible term stock' policy. It is dated March 13, 1899. The annual premium thereon is $74.61.

"The policy sued upon was issued in pursuance of a written and printed application therefor made by the insured under date of March 4, 1899. Said application requests the issuance of a 'ten-year convertible term stock' policy, and states that the premium of $74.61 is to be paid annually. It concludes with a recital as follows: 'A note for premium of $74.61 has been paid under this application, to make the insurance binding from the date hereof, on condition that if the risk is not assumed by the company, this sum is to be returned, in accordance with the receipt given as voucher for said payment.'

"On March 4, 1899, the insured executed and delivered to S. E. Starn, as agent of the defendant, in partial settlement of his premium, his note, reading as follows:

'$37.30. March 4th, 1899.

Six months after date I promise to pay to the order of myself thirty-seven 30–100 dollars, at Ft. Worth, Texas, value received, with interest at 6 per cent per annum.

T. M. Lewis, M. D.'

"Which he endorsed in blank as follows: 'T. M. Lewis, M. D.'

"On March 5, 1899, S. E. Starn transmitted to the defendant the insured's said application and note with a letter, which in so far as it is material to this bill of exceptions, reads as follows: 'I herewith hand you application of Thomas M. Lewis for $3,000.00, 10-year term con. stock. Also his note to cover settlement.' These papers were received by the defendant March 8, 1899, at its office in Chicago.

"The application was accepted by the defendant March 13, 1899. The defendant did not signify to Thomas M. Lewis its acceptance of his application in any way other than by making out and forwarding to its agent, S. E. Starn, for delivery the policy sued upon, and the premium receipt hereinafter mentioned, which it did on March 16, 1899.

"On March 18, 1899, S. E. Starn countersigned the premium receipt, and delivered it and the policy sued upon to the insured. The policy and receipt were delivered at the same time and were received by the insured.

"Said premium receipt reads as follows.

'Iowa Life Insurance Company.

Chicago office.

'Received $74.61, being the first annual premium due March 4, 1899, under policy No. 30140, on the life of Thomas M. Lewis, subject to the terms of the contract and the conditions on the back hereof.

'Read the notice to policyholders on the back of this receipt.

'This receipt is not binding unless it is countersigned by

(Signed) C. E MABIE, *President.*

S. E. STRAN, *Ag't, Ft. Worth, Tex.*'

'Countersigned this 18th day of March, 1899. S. E. STARN.'

(On back of receipt.)

'For terms of mutual agreement, see application and policy.

Notice to Policyholders.

'This receipt, to be valid, must be signed by the president or secretary of the company, and in exchange therefor, cash or its equivalent, be given by the holder of the policy, on or before date payment is due and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

'If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine.'

"For the first annual premium, the insured gave the above-described note for $37.30, and agreed to perform professional services for S. E. Starn to the value of the remaining $37.31. Starn was to furnish professional work to be done by Dr. Lewis in the examination of applicants for insurance and otherwise, and Dr. Lewis was to do it and let Starn have the fees. No work ever was done and no money ever was paid to S. E. Starn or the defendant in pursuance of this verbal arrangement. Except that the note was given and the verbal agreement made, as just above stated, the defendant never received, and the insured never paid, anything upon account of the premium for the policy sued upon. S. E. Starn testified that before the issuance of the policy he reported to the defendant his agreement with Dr. Lewis concerning the payment of the premium.

"The policy sued upon is in the form always used by the defendant in making contracts of insurance of the kind designated by its 'ten-year convertible term stock' contracts. At the time of issuing said policy it was the defendant's universal practice to issue with its policies premium receipts in form like the one delivered to the insured in this case.

"The defendant never sold or transferred the note received by it from the insured, but continued to be the owner thereof until the time of the trial. Some time before its maturity the defendant sent said note to S. E. Starn for collection. S. E. Starn deposited it for collection with the Farmers' & Mechanics' National Bank of Fort Worth, Texas, on August 24, 1899. The bank held the note until September 25, 1899, when it returned it unpaid to S. E. Starn. The manager of its collection department testified that it would have accepted payment of the note at any time before its return to S. E. Starn, and that it had received no instructions from S. E. Starn with reference to the acceptance of payment after maturity.

"S. E. Starn made no effort to collect the note before its maturity, except that he deposited it in the bank for that purpose, nor had he, up to that time, furnished any professional work for the insured to do, in pursuance of the verbal agreement, or made any effort to get the insured to do any work, or pay any money on account of such agreement.

"About September 29, 1899, S. E. Starn called at the residence of the insured in Fort Worth (he being at the time confined to his bed from illness, the nature of which was typhoid fever, and from the effects of which he died October 7) and there had an interview with the plaintiff and the insured. Concerning this interview the evidence is conflicting. The evidence introduced by the plaintiff tended to prove that Starn stated that he had called for the purpose of collecting the note, that the plaintiff promised that it should be fixed up at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1 following. The evidence was sufficient to have supported a verdict that this was a fact. Mr. Starn denied that he called for the purpose of collecting the note, and denied that he had made the statement that the note could be paid at any time before October 1, or the date on which he would make his report to the defendant.

"Dr. Green, one of the physicians attending the insured, met Mr. Starn as the latter was coming out of the plaintiff's house. Starn inquired of the doctor if he intended returning to the city after seeing his patient. Being answered in the affirmative, Starn stated that he would wait in the doctor's buggy and go up town with him. While the doctor was in the house the plaintiff requested him to call on J. R. Reeves at the latter's pharmacy and ask him to pay off the insured's note for them, held by Starn; the doctor agreeing to do so. Dr. Green and S. E. Starn rode in the former's buggy from the plaintiff's residence to the business portion of the city of Fort Worth. Mr. Starn left the buggy as soon as the business portion of the city was reached and Dr. Green drove immediately to Reeves' pharmacy and indicated to him the plaintiff's request. Mr. Reeves agreed to pay off the note as requested, and the doctor agreed to notify Starn.

"Concerning the conversation which ensued between Dr. Green and Mr. Starn on the way to town, the evidence is conflicting. Dr. Green testified that Mr. Starn stated that he had called at the plaintiff's house to collect the note. Mr. Starn denied having made such statement.

"Some time during the afternoon of this day Dr. Green notified S. E. Starn that J. R. Reeves, the druggist, would pay off the note. Concerning the conversation which occurred between Dr. Green and Starn immediately following this notification, the evidence is conflicting. Dr. Green testified that Starn said he would go down to the pharmacy for that purpose; that some statement was made about his going to Reeves' pharmacy to get the money that evening, and that Starn said it would not be necessary, that he would go down by nine or ten o'clock the next morning. S. E. Starn testified that he stated to Dr. Green that he would call and see Mr. Reeves the next morning.

"The night following this interview Mr. Starn sent to the defendant a night-rate telegram, reading as follows:

'Fort Worth, Texas, September 29, '99.

Iowa Life Ins. Co., Chicago:

Dr. T. M. Lewis offers to pay premium to-day. Very sick. Shall I receive it?

S. E. STARN.'

"The next morning, September, 30, 1899, the defendant, through its secretary, telegraphed to S. E. Starn as follows:

'To S. E. Starn, 615 Grove St., Fort Worth, Texas:

'Do not accept payment on note due September 4. Answer.

R. E. SACKETT, *Sec.*'

"On the same day defendant wrote to S. E. Starn a letter reading as follows:

'Mr. S. E. Starn, 615 Grove St., Fort Worth, Texas.

'Dear Sir: We are in receipt of your telegram as follows: 'Dr. T. M. Lewis offers to pay premium to-day. Very sick. Shall I receive it?' to which we replied as follows: 'Do not accept payment of note due September 4. Answer.' We presume this telegram refers to policy No. 30140, Thomas M. Lewis, $3,000, convertible term, premium $37.60, upon which note was received at this office in the sum of $37.30, due September 4, 1899, and which was sent to you for collection.

Very truly yours,

R. E. SACKETT, *Sec.*'

"Some time in the morning of September 30, 1899, S. E. Starn called at the pharmacy of J. R. Reeves and Mr. Reeves, informed him that he had the money to pay off the Lewis note and had been waiting for him. Mr. Starn thereupon informed Mr. Reeves that he could not accept the payment of the notes because he had received a telegram from the company instructing him not to do so. Later in the day Mr. Reeves and Dr. Green called on Mr. Starn, and Reeves made a tender of the amount of the note, which Starn refused to accept. Reeves kept the money he tendered to Starn and did not pay or deliver same to the plaintiff or the insured or to any one for them, and had no interview with the plaintiff or the insured.

"On the same day Starn telegraphed the defendant as follows:

'Fort Worth, Texas, September 30th, '99.

Iowa Life Ins. Co., Chicago:

I have refused payment on Lewis policy this 10.30 A. M.

S. E. STARN.'

"The only testimony with regard to any consideration for the promise claimed by the plaintiff to have been made to her by S. E. Starn that he would accept payment of the note is the following passage from the cross-examination of the plaintiff: 'Q. Did you pay Mr. Starn anything? A. No, sir.—Q. He simply told you he had come to see the doctor about his note, and that it ought to be fixed up, and you said you would attend to it? A. Yes, sir.—Q. That is all that occurred between you? A. Yes, sir.'

"The attention of the plaintiff was not directed to the fact that she was being questioned concerning a consideration for the extension of the time for payment of note other than is indicated by the questions put to her.

"At the request of the defendant, S. E. Starn returned to it the note of the insured, which thereafter continued in the defendant's possession. The defendant never offered to return the note to the insured and never before the death of the insured did anything in the way of an affirmative forfeiture or cancellation of the policy, and no communication passed between the defendant and S. E. Starn regarding said note between the transmission of the note to Starn for collection and Starn's above-quoted telegram of September 29, 1899.

"Except for the evidence upon the question of the extent of S. E. Starn's authority the foregoing is a full statement of all material facts upon the issue of the forfeiture of the policy sued upon for non-payment of the premium note, and the waiver of such forfeiture."

Mr. Justice McKenna delivered the opinion of the Court.

1. It will be observed that there was printed upon the back of the receipt given for the first premium the following: "If note be given for the payment of the premium hereon, or any part thereof, and same is not paid at maturity, the said policy shall cease and determine." The contention of plaintiff in error is that such provision constituted a part of the contract; and contending also that the note was not paid, urges that the policy ceased and determined. The same contention was made in the trial court but rejected. The court held that the provision on the back of the receipt constituted no part of the contract, and instructed the jury, against the objection of plaintiff in error, "that the contract by its own explicit terms, is wholly included in the policy—the life insurance proper, and in the application for such life insurance policy, which, by the terms of the policy, is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. *Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement between the parties as to the provision upon the back of the receipt.* [The italics

are ours.] Such provision is nowhere noted in the face of the contract of insurance; it is nowhere noted in the application for the insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere. Even if the provision were considered a part of the contract entered into between the parties, yet it is such a provision that, if taken advantage of, would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity the company should have within a reasonable time thereafter notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that any such action was taken on the part of the insurance company."

The court also instructed the jury "that it was the duty of the company to notify the insured of the non-payment of the note, and that the policy, because of such non-payment, had ceased and determined, and that the company would no longer be liable thereunder."

These instructions, expressing the conception of the law, and the rights of the parties entertained by the court, and the court also regarding the conduct of the company as waiving proofs of death, naturally instructed the jury that it was its "duty to return a verdict for the plaintiff for the face of the policy," with interest and penalty, and attorney's fees, as prescribed by the Texas statute. "This, therefore," said the court, "leaves to the jury but one question to determine, the fixing of reasonable attorney's fees for the prosecution of this suit."

Were the instructions correct? And first, as to what papers constituted the contract.

The delivery of a policy of insurance and the payment of the premium are reciprocal or concurrent considerations. Necessarily, therefore, the payment of the premium can be exacted simultaneously with the delivery of the policy. Of course, such payment can be waived and a note—the credit of the assured—accepted, either absolutely or upon conditions. And we do not see how it can make any difference where the conditions are expressed—whether in the policy, in the note or in the receipt given for the premium, or whether on the face of the latter or on its back. The agreements of parties may be expressed in many papers, and if the connection of the papers is not apparent it may be shown by parole. The present case does not even need the aid of that rule. The receipt expressed the conditions upon which the note was received—unmistakably expressed them. The receipt of the premium was expressed to be "subject to the terms of the contract and the conditions on the back" of the receipt. And the assured was directed to read the notice upon the back of the receipt. The notice was as follows: "If note be given for the payment

of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

It is not contended that it was not competent for the company to make the condition. It is asserted that it did not become a part of the contract upon which the minds of the parties met—that the minds of the parties only met upon the application, the policy and the note. We cannot assent to this view. The payment of the premium was a very essential thing, and the manner of its payment, whether in cash or by note, and provision for the payment of the note and the effect of its non-payment, were also essential things, and necessarily must have been of mutual concern to the parties and upon which their minds must be considered as having met. To hold otherwise would be to hold that the parties were indifferent to that which materially concerned them. It was certainly of concern to the assured to know whether he would be indebted upon an overdue note or whether his insurance had lapsed.

All of the papers, therefore, embodied the agreement of the parties. In *Insurance Co.* v. *Norton*, (96 U. S. 234,) the agreement was considered as "embodied in the policy and the endorsements thereon, as well as in the notes and the receipt given therefor." (page 240.)

2. But in determining that the minds of the parties met upon the receipt does not solve the main question in the case. The receipt provides that, if the note, or any part of it, be not paid at maturity, the policy shall "cease and determine." What does this mean? That the policy shall cease and determine at the occurrence of maturity, or at the option and upon some affirmative action of the company? The latter is the contention of the defendant in error and, as we have seen, the ruling of the trial court: the former is the contention of the plaintiff in error. Upon the issue thus made the cases are not harmonious. The decisions of this court, however, support the contention of plaintiff in error.

In *New York Life Insurance Company* v. *Statham et al.*, (93 U. S. 24,) Mr. Justice Bradley, delivering the opinion of the court, said: "Promptness of payment is essential in the business of life insurance. . . . Delinquency cannot be tolerated nor redeemed, except at the option of the company. . . . Time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract. . . . Courts cannot, with safety, vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence." The intervention of war was held not to avoid a forfeiture.

This case was quoted and its doctrine announced again in *Klein* v. *Insurance Co.*, (104 U. S. 88;) and again in *Thompson* v. *Insurance Co.*, (104 U. S. 252.)

In *Klein* v. *Insurance Co.* it was said: "If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be paid. The companies must have efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on the failure of the insured to pay premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract."

A forfeiture, of course, may be waived, for the obvious reason expressed in *Insurance Co.* v. *Norton*, (96 U. S. 235,) "a party always has the option to waive a condition or stipulation in its own favor," and an agent can be given such power and whether it has been given or not may be proved by parole.

The latter case is an important one. The policy provided that not only a failure to pay any premium, but "the failure to pay at maturity any note, obligation or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein."

The court not only asserted the doctrine of strict punctuality of payment *ad diem*, but applied the rule to a note for part payment.

Expressing its view of forfeitures, the court said: "Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. It is true, we held in *Statham's case*, (93 U. S. 24,) that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given the courts could be liberal in construing the transaction in favor of avoiding a forfeiture."

We shall presently consider how far these principles apply to a claim of waiver of forfeiture in the case at bar. Our present inquiry is when and how does forfeiture occur, and it seems an obvious conclusion from the cited cases that forfeiture occurs upon non-payment of the premium *ad diem*. But against the conclusion *Insurance Co.* v. *French*, (30 Ohio St. 240,) and its approval by this court in *Thompson* v. *Insurance Co.* are cited.

It was contended in the latter case that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture,

and *Insurance Company* v. *French*, (30 Ohio St. 240,) was cited to support the contention. To the contention and citation it was replied: "But in that case, no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity."

A review of *Insurance Company* v. *French* is demanded. Was the reasoning in that case approved or only its conclusion? The policy passed upon contained a provision for forfeiture if the *premium* should not be paid, but no provision for forfeiture if *premium notes* should not be paid. The receipt which had been given was absolute. The provision for forfeiture was contained in the note. The case was somewhat complicated by questions of fact regarding the power of the company's agent to accept the notes or to grant extensions of time, but that the power existed was accepted as concluded by the verdict. The insurance company, nevertheless, asserted as a conclusion from the non-payment of the note that the policy had been forfeited. To this the court (Supreme Court of Ohio) replied:

"In most of the cases which have been cited in argument the policy contained a clause that it should be void upon non-payment of the premium. This policy, however, contains no clause of avoidance for the non-payment of notes given for premium.

"It is not insisted that the non-payment of the check alone forfeited the policy, but it is claimed that failure to pay the note does work out this result. It will be seen that the note stipulates in terms that if it is 'not paid at maturity said policy is to be null and void.'

"It cannot be successfully maintained that this clause makes the policy absolutely void upon non-payment of the note. Under the authorities such a clause, being introduced for the benefit of the insurance company, means that the policy shall be void if the company insist upon it; but it is their option to say whether this result shall follow or not."

And further—

"We, therefore, cannot consider payment of this note as absolutely necessary before the renewal attached. It may not perhaps be necessary to hold, as did the court below, that demand of payment the day the note was due was necessary to work a forfeiture, but certainly something must be done between the date the note was due and the end of the year to establish and proclaim the forfeiture, or it must be held to be waived."

To sustain the conclusion the following Illinois cases were cited: 77 Ill. 384; 37 Ill. 354; 49 Ill. 180. The court also cited *Joliffe* v. *Mad. Ins. Co.*, (39 Wis. 119,) and quoted the following principle: "Forfeitures are not favored in the law, and will not be sustained upon mere inferences. Where, upon breach by one party of a condition or stipulation in a contract, the other party thereto has the option to declare the contract forfeited, and thus relieve himself from liability upon it, and seeks to exercise such option, he must do so unconditionally, and in plain, positive and unmistakable terms." And the court finally concludes that, "in the case at bar, the company should not have retained the check and note and remained silent, as they did. Yet it appears that on July 6, 1868, when Simpson refused the premium for that year, French offered to give up his policy if the company would return his check and note. This was refused."

What, then, did this court mean by pronouncing the decision in *Insurance Company* v. *French* as "entirely correct?" Were the various principles the law expressed in that case approved or only the conclusion of the court from the facts? Did this court intend to approve the proposition that to cause a forfeiture some affirmative action was necessary by the company—a declaration to that effect and the surrender of the premium notes? To hold the latter would be to hold that this court intended to reverse a number of decisions made upon careful consideration. Indeed it would be contrary to the reasoning in the very opinion in which the French case is approved. A replication was set up alleging a usage of the insurance company to give notice to the assured of the date of payment and answering it this court said: "This is no excuse for non-payment The assured knew or was bound to know when his premiums became due . . . The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not."

And again, as to the usage of the company not to demand punctual payment at the day, or to give thirty days of grace, it was said: "This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff himself calls it, an act of 'leniency.'"

In our other decisions, which we have cited, it was held that time is the essence of the contract, and non-payment at the day involves absolute forfeiture. In none of the cases was there any affirmative action by the company. Forfeiture occurred from non-payment of the premium. The same principle was announced and illustrated in *Life Insurance Company* v. *Pendleton*, (112 U. S. 696.) In that case a foreign bill of exchange was accepted in payment of the premium, but upon presentation to the

drawee was not accepted. There was some controversy as to whether it was presented for payment. The trial court (Circuit Court of the United States) held (7 Fed. Rep. 169,) and instructed the jury that the true measure of the duty of the company was to be found in the rules of law governing the holder of commercial paper; that by taking the draft the company assumed all of the duties of the holder of such paper, and that it was, therefore, the duty of the company to have had the draft protested and to have given notice of non-acceptance as a condition of forfeiture. This court disagreed with the Circuit Court and held that protest and notice were not necessary. In other words, held, not the law of commercial paper, but the contract of the parties determined the conditions of forfeiture, and that the contract of the parties was expressed in the draft to be that the policy should become void if the draft was not paid at maturity. "We think it clear," was said:

"Therefore, that notwithstanding the renewal receipt, the condition expressed in the draft was binding on the insured. As we have shown, that condition was that the policy should become void if the draft was not paid at maturity. The draft, being without grace, matured on the 14th of October, 1871. If not paid on that day the policy was forfeited, unless it was the usage of the New Orleans banks to grant days of grace even when they were waived, of which there was some evidence on the trial. In such case the forfeiture would take place, if the draft were not paid on the 17th of October. Of course, it must be presented for payment on the one day or the other — for the drawees could not pay it unless it was presented, for they would not know where to find it. But supposing it to have been presented for payment, and payment refused by the drawees, the condition of forfeiture was complete. Protest and notice of non-payment might be further necessary to hold the drawer, if the insurance company desired to hold him; but they were not necessary to the forfeiture. That occurred when non-payment at maturity or presentation occurred. The drawer, Pendleton, who took entire charge of the policy for his children, put its existence on the condition of payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid; that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not. Such, we think, was the clear purport of the condition, and as the court below took a different view, holding that the insurance company was bound not only to present the draft for payment, but to have it protested for non-payment, before a forfeiture would ensue, the judgment must be reversed."

See also same case, 115 U. S. 339.

It has been held in cases in the State courts, as in *Insurance Co.* v. *French*, that no forfeiture is incurred until notice by the company has been given that it is claimed. And other cases hold that when the condition of forfeiture is in the note only, the mere fact of non-payment at maturity does not of itself avoid the policy. A review of the cases we do not consider necessary. We prefer to follow our own decisions.

Some of those decisions hold, however, as we have seen, that a waiver of forfeiture may be inferred from the conduct of the company, and that

"courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture." (96 U. S. 244.)

We do not think such circumstances exist in this case. Of course, such circumstances must have come from the company or from its agent acting within his authority. In the case at bar we need only look at that which took place after the note was given. What preceded that, including the arrangement between Starn, the agent of plaintiff in error, and the assured, for the employment of the latter by the former, must be considered as having been approved by the company. Its rights and the rights of the assured depend, therefore, upon what it did in regard to the note before or after it became due or what Starn did within his authority. The company did nothing but send the note to Starn for collection, and Starn deposited it for collection with the Farmers' and Mechanics' National Bank of Fort Worth, Texas, on August 24, 1898—a month before it was due. The assured did nothing; made no movement, as far as the record shows, for its payment. In other words, the day of maturity came and went, and the note was not paid, and the condition upon which the policy should "cease and determine" occurred, unless Starn's authority lasted and could be exercised after the note became due. He received the note back from the bank on the 25th of September, and on the 29th of September he called at the residence of the assured—the latter then being confined to his bed with typhoid fever (of which he died October 7). The evidence of what transpired there was conflicting, but the record admits would have supported a verdict; "that Starn stated that he had called for the purpose of collecting the note; that the plaintiff promised that it should be fixed at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1st following." And it must also be accepted as true that Starn told Dr. Green that he (Starn) had called at Lewis' house to collect the note, and that the doctor notified Starn that Reeves, the druggist, would pay it, and the latter, on September 30, in the presence of Dr. Green, tendered the amount of the note to Starn, who refused it.

On the 29th of September, as set out in the statement of facts, Starn telegraphed to the company that Lewis offered to pay the premium, and asked if he should receive it. On the 30th the company replied in the negative, and on the same day wrote to Starn. Were Starn's acts authorized? They can only be so held as an inference from the authority given him to collect the note. In other words, that the authority to collect the note conferred authority to extend the time of payment and to waive the forfeiture which had occurred by non-payment. It would be difficult to so hold even if his contract with the company did not forbid the exercise of such power and the provisions of the policy preclude it. The policy provides as follows: "All agreements made by this company are signed

by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company."

And the contract constituting Starn the company's agent contains the following: "The party of the second part agrees to submit to and abide by all rules and regulations of said company. . . . Agents are not authorized to collect any renewal premium after the day on which the same becomes due, except in accordance with special instructions from the company in each individual case."

There is no evidence of any course of dealing of the company or of Starn which enlarged or modified these instructions, or which induced and excused the default of the assured.

3. The Circuit Court instructed the jury substantially that the plaintiff in error was estopped from setting up the provision of the policy requiring proofs of death. The instruction is assigned as error. We concur with the Circuit Court. The conduct of the company was tantamount to a waiver. (*Life Insurance Co.* v. *Pendleton*, *supra.*)

4. Notwithstanding our decision in *Mutual Life Association* v. *Mettler*, (185 U. S. 308,) the plaintiff in error urges the unconstitutionality of the the Texas statute, authorizing the recovery of damages and attorney's fees for failure by life and health insurance companies to pay losses. We are, however, entirely satisfied with the case and its reasoning.

It is insisted, however, that to justify a recovery of the statutory damages demand of payment of the policy before suit was necessary, notwithstanding the denial of liability by the company. The contention is sustained by the decision of the Court of Civil Appeals of Texas in the case of the *Northwestern Life Assurance Co.* v. *Sturdevant*, (59 S. W. Rep. 61.) That case also decided "that the suit itself would not be such demand as the statute intended." It was held, however, that demand could be made after suit and set up by "an amended petition as an original suit." The Supreme Court of Texas refused a writ of error to review the case. (94 Tex. 706.) We may therefore adopt its construction of the State statute. It can be easily conformed to by defendant in error if a new trial of the case at bar be prosecuted.

On account of the errors indicated the judgment of the Circuit Court is reversed and the cause remanded with directions to award a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.